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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 252

**ALLEN-BRADLEY LOCAL No. 1111, UNITED ELEC-
TRICAL, RADIO AND MACHINE WORKERS OF
AMERICA, ET AL., APPELLANTS,**

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY**

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JULY 10, 1941.

SUPREME COURT OF THE UNITED STATES

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vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD
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[fol. 1]

IN SUPREME COURT OF WISCONSIN**AUGUST TERM, 1940****No. 213**

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, Fred Wolter, Esther Kusmierek, Esther Greenemeier, Sophie Koscierski, Frances Chandek, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabresa, Edward Okulski, Peter Blazek, Eilif Tomte, Edward Larson and Mike Demski, Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and ALLEN-BRADLEY COMPANY, a Wisconsin Corporation, Respondents

Case[fol. 2] **IN CIRCUIT COURT OF MILWAUKEE COUNTY**

PETITION FOR REVIEW OF "FINAL ORDER" OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD DATED FEBRUARY 1, 1940

(Omitting formal parts)

The petitioners above, Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, a labor organization, Fred Wolter, Esther Kusmierek, referred to in the final order as "Esther Kuzmerek," Esther Greenemeier, referred to in the final order as "Esther Greenmeier," Sophie Koscierski, referred to in the final order as "Sophie Kozcierski," Frances Chandek, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabresa, referred to in the final order as "Tony Calabreesa," Edward Okulski, referred to in the final order as "Edward O'Kulski," Peter Blazek, Eilif Tomte, referred to in the final order as "Eilif Tompte," Edward Larson, and Mike Demski, referred to in the final order as "Mike Dempiski," by their attorney, Max E. Geline, respectfully petition this Court for review of the "final order" duly made and entered by the Wisconsin Employment Relations Board (hereinafter referred to as the "Wisconsin Board"), on the 1st day of

February, 1940, said final order being made and entered in proceedings entitled, "Allen-Bradley Company, complainant, vs. Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, respondent," case No. 6; Cw-1, Decision No. 4A. Said petitioners in filing this petition for review of the final order do hereby reserve all rights of said petitioners by reason of the special appearance heretofore made in the original proceedings before said Wisconsin Board on or about the 19th day of June, 1939, and further reserve all objections made and entered in the proceedings to the jurisdiction of the Wisconsin Board in the aforementioned proceedings, and do not, by these proceedings, for review, in any manner, appear generally or submit to the jurisdiction of the Wisconsin Board over the petitioners herein, and, further, reserve all rights arising by reason of appearances, objections and oral and written pleadings and motions filed by said petitioners in the aforementioned proceedings. With the aforementioned reservations of rights of said petitioners, petitioners, in support of said petition for review herein, state the following as the grounds upon which a review is sought:

1. The petitioner Union is a labor organization consisting of employees of the Allen-Bradley Company, and as such is the exclusive representative of employees in production departments in an agreed-upon bargaining unit for purposes of collective bargaining with the Allen-Bradley Company with respect to matters of wages, hours, working conditions and other terms and conditions of employment, pursuant to Section 9 (a) of the National Labor Relations Act.

[fol. 4] 2. That the Allen-Bradley Company is engaged in the manufacture of electrical control equipment and radio parts in the City of Milwaukee, Wisconsin, employing approximately seven hundred (700) persons, and, as such, is engaged in interstate commerce within the meaning of the National Labor Relations Act, and is subject to the jurisdiction of the National Labor Relations Act.

3. The petitioner Union, Allen-Bradley Local 1111, United Electrical, Radio and Machine Workers of America, and the members thereof who are employees of the Allen-Bradley Company, including the named petitioners herein,

found guilty of alleged unfair labor practices by the respondent, in the final order aforementioned, are each and all entitled to all the rights and benefits, as employees of said Allen-Bradley Company, established and created under and pursuant to the terms and provisions of the National Labor Relations Act.

4. That the National Labor Relations Act, 49 Statutes 449, is a Federal Law enacted by Congress, pursuant to the authority delegated to Congress by Article I, Section (8) of the Constitution of the United States, to regulate interstate commerce. That the purpose of said act was and is to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce by encouraging the procedure of collective bargaining, and for other purposes set forth in Section (1) of said act.

[fol. 5] 5. That the Congress of the United States, in enacting the National Labor Relations Act, purported to and did regulate the rights and duties of employers and employees and labor organizations with respect to, among other matters, the rights of employees to self-organization and collective bargaining, the rights of employees, whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment, to continue and remain employees of employer subject to said National Labor Relations Act. That said act, further, created the National Labor Relations Board which is empowered in said act to prevent any person from engaging in unfair labor practices affecting commerce; that the power so conferred upon said Board is exclusive. That, in general, said National Labor Relations Act further regulates the rights of employees to self-organization and designation of representatives of their own choosing and prohibits employers from engaging in unfair labor practices set forth in section 8 of said act. That the purpose of said act is to regulate employer-employee relations with respect to matters relating to collective bargaining for the purpose of encouraging the practice and procedure of collective bargaining by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the

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terms and conditions of their employment or other mutual aid or protection.

[fol. 6] 6. That in pursuance of said policy said National Labor Relations Act provides and defines "employees" of an employer, as follows:

"Definitions, Section 2. When used in this act—Subsection (3), the term "employee" shall include any employee and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute, or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment * * *"

7. That under and pursuant to the terms and provisions of said National Labor Relations Act and, particularly, section 2, subsection (3) thereof, the named individual petitioners herein, at all times set forth in the final order, were and still are employees of the Allen-Bradley Company, even though they had, as individuals, ceased their work for said Allen-Bradley Company, as a consequence of, or, in connection with, the current labor dispute which commenced on May 11, 1939, and continued to and including August 4, 1939.

8. That as such employees, said petitioners, under the National Labor Relations Act, have a present lawful right to employment at said Allen-Bradley Company, with all the rights and benefits resulting to said employees, arising from seniority and other rights, without any regard to the fact that each of said employees ceased their work from May 11, 1939, to August 4, 1939, by reason of the aforementioned strike.

[fol. 7] 9. That the Wisconsin "Employment Peace Act," enacted as Chapter 57 of the Laws of 1939, Chapter 111 of the Wisconsin Statutes, of 1939, is a general law passed by the Wisconsin Legislature which, in general, seeks to regulate the subject of rights and duties of employers and employees and labor organizations engaged in interstate commerce and intrastate commerce, with reference to matters of self-organization of employees for purposes of collective bargaining, and collective bargaining between employers and employees and similar related matters.

10. That, among other matters, said Wisconsin "Employment Peace Act," in general, defines the status of employees and sets forth unfair labor practices for employers, employees and labor organizations, including employers, employees and labor organizations subject to the National Labor Relations Act. Section 111.02, Subsection (3) of said Wisconsin Act defines an employee as follows:

"111.02. Definitions. When used in this chapter: (3) The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin, in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused [fol. 8] or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lock-out; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the federal railway labor act."

11. That under and pursuant to section 111.02, subsection (3) (b) employees who have been found to have committed or to have been a party to any unfair labor practices lose their status as employees. That the unfair labor practices therein referred to are contained in section 111.06, subsection (2) (a) to (j), inclusive, and are as follows:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in sec-

[fol. 9] tion 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

“(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

“(c) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

“(d) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employees or their representatives accepted.

“(e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

“(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use [fol. 10] of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

“(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use or disposition of materials, equipment or services; or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services; or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in

similar occupations working for other employers in the same craft.

“(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

“(i) To fail to give the notice of intention to strike provided in section 111.11.

“(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.”

12. That the petitioners, named in the findings of facts and in paragraph 2 of the conclusions of law of the final order, have, by reason of the fact that said petitioners are named therein as having been guilty of unfair labor practices, as a legal consequence, lost their status as employees of the Allen-Bradley Company in so far as and, if, the Wisconsin Act is applicable to said named employees and to the Allen-Bradley Company.

13. That the named petitioners, Fred Wolter, Esther Kusmirek, Esther Greenemeier, Sophie Kosciarski, Frances Chandeck, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabresa, Edward Okulski, Peter Blazek, Eilif Tomte, Edward Larson and Mike Demski, at all times have been and now are employees of the Allen-Bradley Company under and pursuant to the terms and provisions of the National Labor Relations Act.

14. That Section 111.02, Subsection (3) of the Wisconsin Act, and Section 111.06, Subsection (2) (a) to and including (j), of said Wisconsin Act, are repugnant to and in conflict with Section 2, Subsection (3) of the National Labor Relations Act, and the conflict and repugnance between said provisions of said Wisconsin Act and said National Labor Relations Act is so substantial and drastic that said provisions of said two acts cannot consistently stand together with respect to said petitioners so named in said final order of the Board, and, by reason thereof, said provisions are void and unconstitutional in so far as applicable to petitioners, who are subject to the regulations provided in the National Labor Relations Act.

15. That by reason of said conflict and repugnance between said two acts, with respect to said matter, the Wis-

consin "Employment Peace Act" is superseded by said National Labor Relations Act and the exercise by said Wisconsin Employment Relations Board of jurisdiction in the [fol. 12] matter of finding the named petitioners guilty of unfair labor practices and thereby terminating their status as employees of the Allen-Bradley Company is null and void.

16. That Section 111.02, Subsection (3) and Section 111.06, Subsection (2) (a) to (j), inclusive of said Wisconsin Act, in so far as applicable to said named petitioners herein, is void and unconstitutional by reason of the interference and conflict in the terms and provisions of said two acts, and, further, by reason of the fact that the aforementioned provisions of said Wisconsin Act constitute an interference with a federal law regulating interstate commerce in violation of Article I, Section (8), and Article II, Section (6) of the Constitution of the United States.

17. That the final order of the Wisconsin Board, in so far as said order found said named employees of the Allen-Bradley Company, petitioners herein, whose names appear in paragraph 2 of the conclusions of law of said final order, to be guilty of unfair labor practices defined and set forth in Section 111.06, Subsection (2) (a) to and including (j), of the Wisconsin Act, and thereby terminated the employee status of said named persons, is void and unconstitutional for the reason that the order of said Board respecting said matter constitutes an interference with the rights of said named employees of the Allen-Bradley Company, established by Congress under Section 2, Subsection (3), of said National Labor Relations Act to be and remain employees of said company, and attempts to terminate a legal status [fol. 13] established by Congress under said National Act, for the express purpose of benefiting the Allen-Bradley Company, to which benefits said company is not entitled under said National Act, and as such constitutes an interference with a law regulating commerce in violation of Article I, Section (8), and Article II, Section (6), of the Constitution of the United States.

18. That said named employees, petitioners herein, would be and are employees of said Allen-Bradley Company under said National Labor Relations Act even if said named employees committed the acts which said respondent found

them to have committed in said final order, and the Wisconsin Board, at no time, nor in any manner, had the jurisdiction to enforce said Wisconsin Act against said named employees for the reason that said Wisconsin Act and the whole thereof was and is inapplicable to said named employees, and the final order, in so far as it is applicable to said employees, and each of them, is null and void and unconstitutional for the reason that same is violative of the rights established by Congress under the National Labor Relations Act for the particular benefit of said employees.

19. That Congress, in enacting the National Labor Relations Act, granted to the National Labor Relations Board the exclusive power to determine, in effectuating the policies of said act, whether misconduct of employees in the course of a labor dispute shall bar such employees from the continuance of their status as employees for and during the period of said strike and thereafter. That the order [fol. 14] of the Wisconsin Board respecting the named petitioners herein constitute an interference with the exercise by said National Labor Relations Board of the exclusive and original powers and jurisdiction given to it by Congress in enacting said National Labor Relations Act, and, by reason thereof, said order of said Wisconsin Board is void and unconstitutional.

20. Petitioners further allege that said final order is wholly and completely null and void and of no force and effect as applied to said petitioners herein for the reason that the Wisconsin "Employment Peace Act," as applied to said Allen-Bradley Company, the petitioner Union and the employees of said Allen-Bradley Company who are members of said Union, is void and unconstitutional for the reason that said act, as applied to the above parties, who are engaged in interstate commerce and subject to the National Labor Relations Act, is in conflict with and repugnant to the National Labor Relations Act.

21. That both the Wisconsin Act and the National Labor Relations Act attempt to regulate the same general subject of employer-employee rights and duties and regulate collective bargaining relations between employers and employees. That Congress, in enacting the National Labor Relations Act, has pre-empted the subject covered by said National Labor Relations Act in the exercise of its powers to regulate interstate commerce, and that the state is with-

out any present authority or jurisdiction to regulate, in any [fol. 15] manner, the same general subject as covered by said National Labor Relations Act.

22. Petitioners further allege that even if it were held that the State of Wisconsin has jurisdiction in the exercise of its police powers to enact a law regulating the same subject as covered by the National Labor Relations Act, the Wisconsin Employment Relations Act is, in its main and major terms and provisions, so in conflict with and repugnant to the terms and provisions of the National Labor Relations Act and the intent of Congress in enacting said federal law that the two acts cannot be reconciled or consistently stand together; that, in consequence thereof, the Wisconsin Employment Peace Act, so far as the same is applicable to parties engaged in interstate commerce and subject to the National Labor Relations Act, is void and unconstitutional and constitutes an illegal and unconstitutional interference with the application and administration of the National Labor Relations Act, in so far as applicable to the petitioners herein and the Allen Bradley Company, and that said Wisconsin Act, by reason thereof, is void and unconstitutional in violation of Article I, Section (8), and Article II, section (6), of the Constitution of the United States.

23. That the Wisconsin "Employment Peace Act" in its major terms and provisions constitutes an indivisible and integrated plan of regulation of the subject of employer and employee rights and duties and collective bargaining, that each and every portion thereof was an inducement for the enactment of other portions thereof, and that the Legislature [fol. 16] would not have enacted portions thereof, such as employer and employee unfair labor practices unless the other subjects of regulation therein contained were valid and applicable to the parties herein. That as a result the entire Wisconsin Act, as applied to employers and employees engaged in interstate commerce and the parties to this action, is wholly null and void and unconstitutional by reason of the fact that same is in conflict with said National Labor Relations Act and the Wisconsin Board was wholly without any jurisdiction to issue a valid final order, and by reason thereof the final order so issued is wholly null and void and of no effect.

24. Petitioners further allege that Section 111.06, subsection (3) of said Wisconsin Act, is in conflict with, violative of and an interference with the intent of Congress in enacting the National Labor Relations Act and constitutes an interference with the exercise by Congress of its powers to regulate interstate commerce. That said final order finding the petitioner Union guilty of unfair labor practices, as therein contained in paragraph 1 of the conclusions of law is void and unconstitutional, for the reason that same constitutes an interference with the National Labor Relations Act and the right of the petitioners under said National Labor Relations Act, and, further, the same constitutes an unlawful interference with the exercise by Congress of its powers to regulate the subject covered by said National Labor Relations Act, in that Congress, in enacting said National Labor Relations Act, intended that [fol. 17] employees and labor organizations should not be subject to unfair labor practices such as are contained in said Wisconsin Act, and on which said order is based.

25. Petitioners further allege that that portion of the final order of said Wisconsin Board ordering said petitioners to cease and desist from picketing the domiciles of any employees of the company, contained in section 1, subsection (e), of the order, constitutes an unconstitutional and arbitrary interference with the rights of the petitioners' Union and its members to the exercise of the right of free speech and to otherwise advocate their cause in a lawful and peaceful manner upon the public highways and streets; that said order, and Section 111.06, Subsection (2) (a) of said Wisconsin Act, on which the prohibition against said home picketing is based, is void and unconstitutional by reason of said act and the portion thereof referred to and the order as made and entered with respect to home picketing being in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, and Article I, Subsections (1), (3) and (4) of the Constitution of the State of Wisconsin.

26. Petitioners further allege that the final order should be dismissed for the reason that the Wisconsin Board at no time has or had jurisdiction to proceed against the petitioner Union or the members thereof named herein as petitioners. That the Wisconsin Board erred in overruling the

motions of the petitioners above to dismiss said proceedings before said Board by reason of the lack of jurisdiction [fol. 18] of said Wisconsin Board to proceed, for the reasons therein mentioned.

27. Petitioners further allege that the order as made and entered with respect to said named petitioners herein is void for the reason that said Board willfully discriminated against the named petitioners herein in designating that said petitioners have committed unfair labor practices, when the record and testimony and findings made by said Board established beyond question that all the members of said petitioner Union engaged in picketing in large numbers on the public highways around and about the premises of said Allen-Bradley Company, and that a large number of other strikers carried on home picketing in a peaceful manner, although in violation of said Wisconsin "Employment Peace Act."

28. Petitioners allege that the discrimination exercised by said Board in refusing to enforce said act against others who had committed unfair labor practices was made, particularly, for the purpose of punishing the leaders of the petitioner Union who were active in said strike, and, thereby, to undermine the standing of said petitioner Union as collective bargaining agency for employees under the National Labor Relations Act.

29. That such discrimination in the enforcement of said act is violative of constitutional due process of law, to which said petitioners are entitled. That by reason thereof the said order is, in all respects, rendered null and void and of no effect.

[fol. 19] Wherefore, petitioners pray that judgment be rendered in favor of said petitioners as follows:

1. That the final order, including the findings of fact, conclusions of law, order and all portions thereof, made and entered by the Wisconsin Employment Relations Board on the 1st day of February, 1930, be vacated, set aside and dismissed upon the merits, and that all proceedings heretofore instituted, including the original complaint filed by the Allen-Bradley Company against the petitioners herein, be dismissed for want of jurisdiction, and, further, by reason

of the fact that said Wisconsin "Employment Peace Act," as applied to petitioners herein, is void and unconstitutional.

2. For such other and further relief as may be just and equitable in the premises.

Max E. Geline, Attorney for Petitioners.

[fol. 20] **Final Order of Wisconsin Employment Relations
Board, Dated February 1, 1940**

(Omitting Formal Parts)

FINAL ORDER

In the above-entitled matter, heard by the full Board after considering all of the evidence, the arguments of counsel, and being advised in the premises, the Board made and filed, on the 13th day of July, 1939, interlocutory findings of fact, conclusions of law and order, which said interlocutory order is herewith confirmed, continued and made a part of this final order.

Having fully considered the matter, the Board now makes and files the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. That the Allen-Bradley Company is a Wisconsin corporation, engaged in the manufacturing business, its factory being located in the City of Milwaukee, Wisconsin.

2. That Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, is a labor organization composed of employes of the Allen-Bradley Company, working in the factory of said company in the City of Milwaukee, State of Wisconsin.

3. That prior to the first day of May, 1939, there had been in force a contract between the company and the Union [fol. 21] governing the terms and conditions of employment, which said contract was canceled by the Union, the cancellation being effective as of the 30th day of April, 1939.

4. That on or about the 10th day of May, 1939, a strike was called by said Union at the factory of the company after the employes of the company had voted by secret ballot ordering such strike, and that said strike was in progress during the hearing conducted by this Board.

5. That from the beginning of said strike, the Union has engaged in mass picketing at all of the entrances to the factory for the purpose of hindering and preventing the pursuit of lawful work and employment by employes of the Allen-Bradley Company who desired to engage in such lawful work or employment.

6. That after the commencement of said strike, the Union obstructed and interfered with entrance to and egress from the factory of the company, and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory of the company.

7. That the Union, by its officers and many of its members, threatened bodily injury and property damage to many of the employes desiring to continue their employment with the company.

8. That the Union required of persons desiring to enter the factory without interference that they obtain passes from the Union at its strike headquarters.

[fol. 22] 9. That the Union, by its officers and many of its members, picketed the domiciles of many employes desiring to continue their employment with the company.

10. That the Union, by its officers and many of its members, injured the person and property of employes of the company who desired to continue their employment with such company.

11. That Fred Wolters was, prior to the time of the strike, an employe of the Allen-Bradley Company, and president of the Union, and that by threats, force and coercion of other kinds, he attempted to intimidate and to prevent certain employes of the company who desired to continue their employment therein, from pursuing their lawful work and employment.

12. That Esther Kuzmerck, Esther Greenmeier, Sophie Kozciarski, Frances Chandek and Agnes Tanko, were prior

to the time of the strike, employes of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent Ruth Batt, an employee of the Allen-Bradley Company, who desired to continue her employment therein, from pursuing such lawful work and employment, and that the said named persons committed an assault and battery upon the person of said Ruth Batt.

13. That Harry Rose and Dan Roknich were, prior to the time of the strike, employes of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent one Marie Rudella, an employee of the [fol. 23] Allen-Bradley Company, who desired to continue her employment therein, from pursuing her lawful work and employment.

14. That Tony Calabreesa and Edward O'Kulski were, prior to the time of the strike, employes of the Allen-Bradley Company, and that by assault, force and coercion, attempted to prevent one Ann Cycosch, who desired to continue her employment with the Allen-Bradley Company, from pursuing her lawful work and employment.

15. That Peter Blazek, prior to the time of the strike an employee of the Allen-Bradley Company, assaulted one Anton Stanwick, an employee of the Allen-Bradley Company, and by such assault attempted to intimidate said Anton Stanwick and to prevent him from continuing his employment with the Allen-Bradley Company.

16. That Eilif Tompte and Edward Larson, prior to the time of the strike, employes of the Allen-Bradley Company, were arrested and convicted of attempting to damage property belonging to employes of the Allen-Bradley Company, who continued to work for said company during the strike, and that such misdemeanor was committed in connection with the controversy then existing between the company and the Union.

17. That Mike Dembski, prior to the time of the strike an employee of the Allen-Bradley Company, was arrested on the picket line maintained by the Union, armed with concrete rocks, and that said Dembski intended to use such rocks for the purpose of intimidating employees of the [fol. 24] company who desired to continue their employment therein, from pursuing such lawful work and employment.

CONCLUSIONS OF LAW

The Board finds, as Conclusions of Law;

1. That the Union is guilty of unfair labor practices in the following respects:

a. Mass picketing for the purpose of hindering and preventing the pursuit of lawful work or employment by persons desiring employment by the Allen-Bradley Company;

b. Threatening employees desiring to pursue their lawful work and employment with the company, with bodily injury and injury to their property;

c. Obstructing and interfering with entrance to and egress from the factory of the company;

d. Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory of the company;

e. Picketing the domiciles of employees of the company.

2. That all the following named employees are guilty of unfair labor practices by reason of threats made by them to other employees, assaults committed by them upon other employees, or misdemeanors committed by them arising out of the controversy between the Union and the company as described in the findings of fact above: Fred Wotters, Esther [fol. 25] Kuzmerck, Esther Greenmeier, Sophie Kozcierski, Frances Chapdek, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabreesa, Edward O'Kulski, Peter Blazek, Eilif Tompte, Edward Larson, and Mike Dembski.

Upon the basis of the foregoing findings of fact and conclusions of law, the Board, pursuant to Section 111.07 (4) of the Wisconsin Statutes, makes the following:

ORDER

It is ordered that the respondent, Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, its officers, agents, successors, assigns and members, shall:

1. Cease and desist from:

a. Engaging in mass picketing at or near the plant of the company.

b. Threatening employes of the company with physical injury, property damage, or otherwise.

c. Obstructing or interfering with entrance to and egress from the factory of the company.

d. Obstructing or interfering with the free and uninterrupted use of the streets, public roads and sidewalks surrounding the factory of the company.

e. Picketing the domicile of any employe of the company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the act:

[fol. 26] a. Post immediately notices to their members in conspicuous places at the Union headquarters that the Union has ceased and desisted in the manner aforesaid.

b. Notify the Board in writing forthwith that steps have been taken by the Union to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of February, 1940.

Wisconsin Employment Relations Board, By Henry C. Fuldner, Chairman, L. E. Gooding, Commissioner, R. Floyd Green, Commissioner.

IN THE CIRCUIT COURT OF MILWAUKEE COUNTY

ANSWER AND CROSS PETITION FOR ENFORCEMENT OF FINAL ORDER OF WISCONSIN EMPLOYMENT RELATIONS BOARD

(Omitting formal parts)

Now comes the respondent, Wisconsin Employment Relations Board, by John E. Martin, Attorney-General; James Ward Rector, Deputy Attorney-General, and N. S. Boardman, Assistant Attorney-General, its attorneys, and for answer to the petition in the above-entitled matter admits, denies and alleges as follows:

1. Admits paragraphs 1, 4, 6, 9 and 10.

[fol. 27] 2. Denies that the Allen-Bradley Company is engaged in interstate commerce, but admits that the business

of the company is such that said company is subject to the terms and provisions of the National Labor Relations Act.

3. Denies that the petitioning Union or the petitioning individuals have any private rights under the National Labor Relations Act.

4. Denies that the purpose of said act is as alleged in paragraph 5 of said petition.

5. Denies paragraphs 7 and 8 of said petition.

6. Admits the allegations contained in paragraph 11, except the first sentence thereof, and denies same.

7. Denies the allegations contained in paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29.

Wherefore, this answering defendant prays that the petition be dismissed and that a judgment be entered affirming and enforcing the order complained of.

CROSS PETITION

Further answering, and for a cross petition, the respondent, Wisconsin Employment Relations Board, pursuant to authority conferred upon it by the provisions of Ch. 57, Laws of 1939, respectfully petitions the Court for the enforcement of the order complained of in the petition for review. In support of this petition the Board respectfully alleges and shows:

[fol. 28] 1. That the respondent, the Wisconsin Employment Relations Board, is and at all times mentioned herein was an administrative body created by Ch. 57, Laws of 1939, and that Henry C. Fuldner is the chairman and L. E. Gooding and R. Floyd Green are commissioners or members of said Board.

2. That the Allen-Bradley Company (hereinafter referred to as the Company) is a Wisconsin corporation engaged in the manufacturing business in the City of Milwaukee, Wisconsin.

3. That the Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America (hereinafter referred to as the Union) is a labor organization in which a large number of the company's factory employees are members.

4. That on June 5, 1939, a complaint was filed with the Board by the company, alleging that the Union, its officers and many of its members, had engaged in, and were then engaging in, unfair labor practices, the complaint alleging, in substance, that on or about May 10, 1939, the Union and some of its members went on strike and continued to strike from that time until the filing of the complaint; that the Union and certain of its members materially hindered and prevented by mass picketing, threats, intimidation, force and coercion, the pursuit of lawful work and employment by many of the employees of the company, and obstructed and interfered with entrance to and egress from the company's factory; that the union engaged in a concerted effort [fol. 29] to interfere with the company's production by acts and conduct other than leaving the company's premises in an orderly manner; that the Union and certain of its members coerced and intimidated various employees of the company and their families by threats and violence; that with full knowledge of the Union several of its members have committed crimes and misdemeanors in connection with the conduct of the strike, and that the Union had aided such members by furnishing, without cost to said members, bail, attorney services, and is intending to pay any fines that may be imposed upon such members for the commission of such crimes and misdemeanors; that the Union co-operated in engaging in promoting or inducing picketing and other overt concomitants of a strike without having a majority of the employees of the company in a collective bargaining unit vote by secret ballot to call a strike. The relief prayed for by the company was that an order be entered to protect the rights of the company to operate its business under conditions of law and order, to protect the rights of such of its employees who desire to continue work, to prevent the Union from intruding into the primary rights of such workers to earn a livelihood and the primary rights of the company to transact its business; and, further, that the Board ascertain and determine which of the members of the Union have committed or have been parties to any unfair labor practices, and to declare that such persons are no longer employees of the company, as defined in the Wisconsin statute.

[fol. 30] Notice of hearing was duly issued by the Board on the 6th day of June, 1939, and copies of such notice, to

which was attached a copy of the complaint, were served by registered mail on Fred W. Wolter, president of the Union; Harley O. Wright, vice-president; Ford Halvorsen, secretary, and Leo Mann, of Lines, Spooner & Quarles, attorneys for the company. Pursuant to such notice a public hearing of the charges was held at the court house in the City of Milwaukee, commencing on the 19th day of June, 1939, and continuing to the 30th day of June, 1939, before the full Board.

5. That the Board, under date of July 13, 1939, entered an interlocutory order pending its final determination, in which the said Board ordered as follows:

"It is ordered that the respondent, Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, its officers, agents, successors, assigns and members shall:

"1. Cease and desist from:

"a. Engaging in mass picketing at or near the plant of the Company and particularly shall refrain from such picketing on the streets surrounding said plant, to-wit: Greenfield Avenue, Madison Street, South First Street, and South Second Street;

"b. Threatening employees of the Company with physical injury, property damage, or otherwise;

"c. Obstructing and interfering with the entrance to [fol. 31] and egress from the factory of the Company;

"d. Obstructing and interfering with the free and uninterrupted use of the streets and public roads and sidewalks surrounding the factory of the Company;

"e. Picketing the domicile of any employee of the Company.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"a. The union may maintain a picket line at or near the premises of the Company, but shall not allow more than fifteen (15) persons to be on such picket line at any one time of the day. Of such fifteen persons, not more than six (6) shall be on any one of the streets surrounding the

plant of the Company at any one time. The pickets are not to obstruct or in any way interfere with entrance to or egress from the plant of the Company. They are not to obstruct or interfere with the free and uninterrupted use of the streets, sidewalks or public roads surrounding the factory of the Company. They are not to in any manner threaten employees or customers of the Company. They are not to endeavor to prevent anyone from entering the factory of the Company, and they are not to jeer at, revile, or call anyone entering the plant vulgar or offensive names. Such pickets are to be maintained solely for the purpose of notifying the public, employees and prospective employees, that a strike is in progress, and are limited to a number sufficient, in our opinion, to let a reasonable person know that such strike is in progress.

[fol. 32] "b. Post immediately notices to their members in conspicuous places at the Union strike headquarters, the Union meeting hall, and on each street corner around the Company's factory stating:

"1. That the Union will cease and desist in the manner aforesaid;

"2. That all picketing is to be carried on as aforesaid;

"3. That such notices remain posted for a period of at least thirty (30) days from the date of posting.

"c. Notify the Board in writing within ten (10) days from the date of the receipt of this Order what steps the Union has taken to comply therewith."

6. That the Board petitioned this Court for enforcement of said interlocutory order and that this Court, under date of January 4, 1940, duly entered judgment enforcing said interlocutory order of the Board.

7. That on February 1, 1940, the Board made and entered its final order in said matter, a copy of which said final order is attached hereto, marked "Exhibit A," and made a part hereof.

8. That the respondent Board has caused to be certified and filed with this Court the complete record in the proceedings, including all documents and papers on file in the said matter, the pleadings and testimony upon which said

order was entered, and the findings and order of the Board to which record reference is hereby made and the said record incorporated herein.

[fols. 33-49] Wherefore the Board prays that the Court enter an order confirming and enforcing the final order of the Board in this matter, dismissing the petition for review, and for such other relief as the facts and circumstances may warrant.

John E. Martin, Attorney-General; James Ward Rector, Deputy Attorney-General; N. S. Boardman, Assistant Attorney-General; Attorneys for Wisconsin Employment Relations Board.

EXHIBIT A—Copy of final order hereinabove set forth at pages 20-25.

[fol. 50] IN CIRCUIT COURT OF MILWAUKEE COUNTY

ANSWER OF ALLEN-BRADLEY COMPANY

(Omitting formal parts)

Now comes the above-named respondent, Allen-Bradley Company, by Lines, Spoener & Quarles, its attorneys, and for answer to the petition in the above-entitled matter admits, denies and alleges as follows:

(1) Admits that petitioner Union is a labor organization consisting of employees of the Allen-Bradley Company, and that at all of the times involved in said proceedings before said Wisconsin Employment Relations Board it was the exclusive representative of employees in the bargaining unit composed of the production departments for the purposes of collective bargaining pursuant to Section 9 (2) of the National Labor Relations Act.

(2) Admits that the said company is engaged in the manufacturing business in the City of Milwaukee, employing in the neighborhood of 700 persons.

Denies that its entire business constitutes interstate commerce, but admits that its business is of such a nature that it would be subject to the terms and provisions of the National Labor Relations Act if, in a proper case and under

proper conditions, the National Labor Relations Board duly sought to subject it to the said act.

(3) Denies that the petitioning Union, or the individual members thereof, on behalf of whom petitioner acts, have any private rights, or are entitled to any private benefits, [fol. 51] under or pursuant to the National Labor Relations Act.

(4) Admits the allegations contained in paragraph 4 of the petition.

(5) Denies that the Congress of the United States enacted said act for the purposes alleged in paragraph 5 of the petition, and alleges the fact to be that the purpose of Congress in enacting said legislation and the extent to which, by said act, Congress purported to and did regulate the conduct of employers with respect to the subject matter of said legislation appears and is set out in said National Labor Relations Act. Denies that said act conferred upon the National Labor Relations Board the exclusive power to prevent any persons from engaging in unfair labor practices either affecting commerce or otherwise.

(6) Admits the allegations contained in paragraph 6 of the petition.

(7) Alleges that the petitioning Union and certain of the employes of said company who were members of said Union went out on strike on or about May 10, 1929, and that under and pursuant to the terms and provisions of said National Labor Relations Act, and particularly section 2 (3) thereof, the named individual petitioners who were among the striking employes were, at the commencement of the strike, included within the statutory definition of the term "employee," even though they were out on strike, but denies that any of said individual petitioners, except Harry Rose, are now employes of said company.

[fol. 52]. (8) Denies the allegations contained in paragraph 8 of said petition.

(9) Admits the allegations contained in paragraph 9 of said petition.

(10) Admits the allegations contained in paragraph 10 of said petition.

(11) Answering paragraph 11, denies the allegations contained in the first sentence thereof, and admits all of the other allegations contained in said paragraph 11.

(12) Denies the allegations contained in paragraphs 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of said petition.

(13) Denies the allegations contained in paragraph 13 of said petition, except that this answering respondent admits that said Harry Rose has not been discharged by it, but that due to lack of work available he has not yet been called back to work.

(14) Further answering, respondent denies each of the allegations contained in said petition not herein specifically admitted or qualifiedly denied.

Wherefore, this answering respondent prays that said petition be dismissed, and that a judgment be entered affirming and enforcing the said final order of the said Wisconsin Employment Relations Board made and entered on the 1st day of February, 1940.

Lines, Spooner & Quarles, Attorneys for Respondent Allen-Bradley Company.

[fol. 53] IN CIRCUIT COURT OF MILWAUKEE COUNTY

DECISION DATED JULY 16, 1940

(Omitting formal parts)

Petition of Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, and fourteen individuals, named petitioners, to review the final order of the Wisconsin Employment Relations Board, dated February 1, 1940, in proceedings entitled, "Allen-Bradley Company, complainant, against Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, respondent. The Board and respondent, Allen-Bradley Company, have interposed answers to such petition and the Board presents its cross petition for judgment confirming its final order and for its enforcement.

On July 13, 1939, the Board issued an interlocutory order in the proceedings herein involved, and on January 4, 1940, judgment confirming such interlocutory order was entered.

by this Court. No material differences are discernible in the orders (interlocutory and final) except that the final order names the individual members (herein named as petitioners) and finds that they have been guilty of unfair labor practices. This additional provision of the final order, it is claimed by petitioners, in effect terminates the employe status of such named members and that it is, therefore, in conflict with and repugnant to the National Labor Relations Act, Section 2 (3). The National Labor Relations Act, it is claimed, guarantees the continuance of the employe status and that any provision in any way restricting or curtailing [fol. 54] such provision must be held to be in conflict therewith and therefore invalid and unconstitutional.

The provisions of the National Labor Relations Act referred to must be held, in the light of the decisions interpreting the act, to continue the employe status for the purpose of effectuating the clear intent of the act, which is to prevent unfair labor practices on the part of the employer from interfering with the protection afforded the employe under the act. In other words, unless the employe status is preserved, the purpose of the act may be defeated. The accomplishment of the same purpose was evidently sought by the enactment of the following portion of Section 111.02 (3), R. S., which reads as follows:

"The term 'employe' shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practices on the part of an employer."

The portion of this section particularly complained of by petitioners herein is as follows, in defining the term "employe," among other things, this language is used:

"(b) Who has not been found to have committed or been a party to any unfair labor practice."

The intent of the National Labor Relations Act with respect to preserving the employe status and the limitation as to its scope implicit therein are set forth in *N. L. R. B. v. Fansteel Corp.*, 306 U. S. 240; *N. L. R. B. v. Mackay* [fol. 55] *Radio & Telegraph Co.*, 304 U. S. 333, 347; *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, 45, 46; *The Public Steel Corp. v. N. L. R. B.*, 107 Fed. (2d) 472; *N. L. R. B. v. Stackpole Carbon Co.*, 105 Fed. (2d) 167.

It is clear intent of the National Labor Relations Act to preserve the employ- status wherever necessary to effectuate the purposes of the act and for that purpose only.

Furthermore the situation here presented by petition does not involve a case of employer unfair labor practices under the findings of the Board which must be held to be conclusive, as heretofore indicated by the decision in the interlocutory order, so that an actual case of conflict is not presented in any event. As was stated in *W. L. R. V. v. Fred Rueping Leather Co.*, 228 Wis. 473, the time to resolve the question of the conflict in the administration of the two acts will be when such situation of conflict is presented.

My conclusion is that no case of conflict between the National and State Acts is presented and that Section 111.02 (b), Wisconsin Statutes must be held a valid enactment.

For the reasons already set forth in the decision of the court affirming the interlocutory order and for the further reasons herein stated, the final order of the Wisconsin Employment Relations Board must be confirmed.

Dated, July 16, 1940.

Otto H. Breidenbach, Circuit Judge.

[fol. 56] IN CIRCUIT COURT OF MILWAUKEE COUNTY

FINAL JUDGMENT.

(Omitting formal parts)

The above-named petitioners' petition for a review of the final order of the Wisconsin Employment Relations Board, dated the first day of February, 1940, in the above entitled matter, seeking to set aside the said order of the Board for the reasons therein assigned, the answer and cross petition of the Board seeking an order confirming and enforcing the provisions of the said order referred to and the answer of the Allen-Bradley Company, a corporation, came on to be heard before this court without a jury, pursuant to the statutory method for review and enforcement of such an order on the 29th day of March, 1940, Hon. Otto H. Breidenbach, Circuit Judge, presiding. The petitioners appeared by Max E. Geline, the respondent, Wisconsin Employment Relations Board appeared by John E. Martin, Attorney-General,

James Ward Rector, Deputy Attorney-General, and N. S. Boardman, Assistant Attorney-General, and the respondent, Allen-Bradley Company, a corporation, appeared by Lines, Spooner & Quarles.

All parties participated in the oral argument and briefs were filed on behalf of all parties and the court having heard the arguments of counsel and having given careful consideration to the briefs filed and having taken the matter under advisement and being fully and sufficiently advised in the premises, and the court having on the 16th day of July, [fol. 57] 1940, rendered and filed its written decision herein wherein judgment is directed as hereinafter adjudged;

Now, on motion of John E. Martin, Attorney-General, James Ward Rector, Deputy Attorney-General, and N. S. Boardman, Assistant Attorney-General, attorneys for the Wisconsin Employment Relations Board and Lines, Spooner & Quarles, attorneys for the Allen-Bradley Company, a corporation, and upon all the records, files, and proceedings had herein,

It Is Ordered and Adjudged, That the final order of the Wisconsin Employment Relations Board, dated the first day of February, 1940, and the findings and conclusions of said Board in the above-entitled matter be and the same hereby are in all respects sustained, confirmed and enforced.

It Is Therefore Ordered and Adjudged, That the Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America, its officers, agents, successors, assigns and members, shall:

1. Cease and desist from:

a. Engaging in mass picketing at or near the plant of the Allen-Bradley Company, a corporation (hereinafter referred to as the Company).

b. Threatening employes of the Company with physical injury, property damage, or otherwise.

c. Obstructing or interfering with entrance to and egress from the factory of the Company.

[fols. 58-77] d. Obstructing or interfering with the free and uninterrupted use of the streets, public roads and sidewalks surrounding the factory of the Company.

e. Picketing the domicile of any employe of the Company.

2. Take the following affirmative action:

a. Post immediately notices to their members in conspicuous places at the Union headquarters that the Union has ceased and desisted in the manner aforesaid.

b. Notify the Wisconsin Employment Relations Board in writing forthwith that steps have been taken by the Union to comply herewith.

It Is Further Ordered and Adjudged, That this judgment be and become effective and enforceable as the judgment of this court as of this date and be entered accordingly.

It Is Further Ordered and Adjudged, That the motion of the petitioners to vacate and set aside the said order be and the same hereby is denied.

Dated, August —, 1940.

By the Court.

— — —, Circuit Judge.

[fol. 78] BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD
COMPLAINT OF ALLEN-BRADLEY COMPANY AGAINST ALLEN-
BRADLEY UNION

(Omitting formal parts)

Now comes the above-named complainant (hereinafter sometimes called the "Company"), by Lines, Spooner, & Quarles, its attorneys, and hereby files its complaint in writing, charging the above-named respondent (hereinafter sometimes called the "Union"), its officers, and many of its members, with having engaged in and with engaging in unfair labor practices, and hereby alleges and shows to the Board as follows:

(1) Complainant is a Wisconsin corporation engaged in the manufacturing business, having its principal office and plant at 1326 South Second street, in the City of Milwaukee, Wisconsin.

(2) The Union is a labor organization, in which a large number of the company's factory employes are members. The officers of the Union and their addresses are as follows:

President, Fred W. Wolters, 209 W. Scott street, Milwaukee, Wisconsin;

Vice-President, Harley O. Wright, 2640 S. Ninth street, Milwaukee, Wisconsin;

Secretary, Ford Halvorsen, 1128A W. Washington street, Milwaukee, Wisconsin.

(3) For the past two years there have been two separate agreements in force between the company and the Union, covering terms and conditions of employment, said Union [fol. 79] having been recognized by each of said contracts as the exclusive bargaining agent of said factory employees. The second of said contracts was canceled by notice of cancellation given by said Union, effective as of April 30, 1939. Following the receipt of said notice by the company, and for approximately three weeks prior to April 30, 1939, said parties collectively bargained with each other in an effort to agree upon terms of a new contract for the period commencing May 1, 1939, but without success.

(4) Commencing on or about May 10, 1939, said Union and some of its members went on strike, and have continued to strike from that time until the present. During the course of said strike, and continuing up to the present time, the said Union and a number of its members have engaged in, and have caused to be committed, the following unfair labor practices, to wit:

(a) Said Union and certain of its members have materially hindered and prevented, by mass picketing, the pursuit of lawful work and employment by many of the company's employees who desire to work; and have obstructed and interfered with entrance to and egress from the company's factory by employees and by others desiring to do business with the company, and have obstructed and interfered with the free and uninterrupted use of the streets and highways in and around the company's plant, all in violation of Section 111.06 (2) (f) of the Wisconsin Statutes.

(b) Said Union and certain of its members have engaged [fol. 80] in a concerted effort, and are now engaging in a concerted effort, to interfere with the company's production by acts and conduct other than leaving complainant's premises in an orderly manner for the purpose of going on strike, in violation of Section 111.06 (2) (h) of the Wisconsin Statutes.

(c) Said Union and certain of its members have coerced and intimidated various employes of the company and the families of various employes by threats and by causing physical violence and damage to the persons, the homes, and automobiles of various employes, and have injured and damaged the persons and property of said employes, all in violation of Section 111.06 (2) (a) of the Wisconsin Statutes.

(d) Said Union and certain of its members have coerced and intimidated, and are now engaging in, the coercion and intimidation of various employes of the company in the enjoyment of their legal rights guaranteed in Section 111.04 of the Wisconsin Statutes, and particularly in their legal rights to work, as well as their legal rights, in some instances to resign from said Union, and, in other instances, to refrain from joining said Union, all in violation of Section 111.06 (2) (a) of the Wisconsin Statutes.

(e) With the full knowledge of the Union several of its members have committed crimes and misdemeanors during the course of, and in connection with, the conduct of the pending strike by the Union, and the Union, with full knowledge of the commission of such crimes and misdemeanors, has failed in any way to restrain or to discipline any of its members committing such crimes and misdemeanors, but, on the contrary, said Union has aided, and is continuing to aid, such members by the furnishing, without cost to said members, of bail, attorney's services, and with intention to pay any fines that may be imposed upon them for the commission of such crimes and misdemeanors, all in violation of Section 111.06 (2) (j) of the Wisconsin Statutes.

(f) Said Union and certain of its members have co-operated in engaging in, promoting, or inducing picketing, and other overt concomitants of a strike, without having a majority of the employes of the company in the collective bargaining unit vote by secret ballot to call a strike, in violation of Section 111.06 (2) (e) of the Wisconsin Statutes.

Wherefore, complainant prays that it may have relief under and pursuant to Chapter 111 of the Wisconsin Statutes, to wit:

(a) That a hearing be had on this complaint at an early date.

(b) That the company have such relief as is directed and warranted under Chapter 111, including specifically the entry of proper orders:

(1) To protect the rights of the company to operate its business under conditions of law and order, and free from all mass picketing, threats, intimidation, force and coercion; and

(2) To protect the rights of such of its employees who desire to continue to work; and

[fol. 82] (3) To prevent the Union and its members, in the conduct of the strike, from intruding into the primary rights of such workers to earn a livelihood, and from intruding directly into the primary rights of the Company to lawfully transact its business, and from intruding directly into the primary rights of both the company and of such workers to engage in the ordinary affairs of life by any lawful means, free from molestation, mass picketing, threats, intimidation, interference, restraint or coercion; and

(4) To eliminate from this strike the conditions caused by the Union and its members, which amount to the primitive methods of trial by combat, which are directly declared to be contrary to the public policy of the State of Wisconsin by Section 111.01 (4) of the Wisconsin Statutes.

(c) That the Board ascertain and determine which of the members of said Union have committed, or have been parties to, any unfair labor practices, and to declare that such persons are no longer employees of the company as defined in Section 111.02 (3) (b) of the Wisconsin Statutes.

(d) That the Board make such further findings and such further order as complainant may be entitled to under the statutes of the State of Wisconsin in such case made and provided.

Allen-Bradley Company, by Lines, Spooner & Quarles, Its Attorneys.

[fol. 83] BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD

**OBJECTION OF ALLEN-BRADLEY UNION TO JURISDICTION OF THE
WISCONSIN EMPLOYMENT RELATIONS BOARD AND MOTION TO
DISMISS COMPLAINT**

(Omitting formal parts)

Now comes the above respondent, Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, appearing specially by Max E. Geline, its attorney, and objects to the jurisdiction of the Wisconsin Employment Relations Board in this action, and moves that the complaint in this action be dismissed upon the ground that the complainant, Allen-Bradley Company of Milwaukee, Wisconsin, is engaged in interstate and foreign commerce, and that by reason thereof is subject exclusively to the provisions of the National Labor Relations Act, an Act of Congress July 5, 1935, Chapter 372, 49 Statutes 349, U. S. Code, Title 29, sections 151 to 166, and to the exclusive jurisdiction of the National Labor Relations Board; and that the Wisconsin Employment Relations Board is without jurisdiction to proceed on the complaint filed under and pursuant to the provisions of the Wisconsin Employment Relations Act for the reason that said act is in conflict with the National Labor Relations Act, and that the Na- [fol. 84] tional Labor Relations Act is exclusive and paramount with respect to the matters set forth in complainant's complaint.

Max E. Geline, Attorney for Respondent, Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America.

BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD

ANSWER OF ALLEN-BRADLEY UNION

(Omitting formal parts)

Now comes the respondent, and without in any manner, however, waiving its special appearance and without waiving its objection to the jurisdiction of the Wisconsin Employment Relations Board to proceed in said matter, and

further without waiving its motion to dismiss the complaint of the Allen-Bradley Company in the above matter on the ground that said Allen-Bradley Company is engaged in interstate commerce and is subject to the National Labor Relations Act, and that the Wisconsin Employment Relations Board has no jurisdiction to proceed in this matter under the Wisconsin Employment Relations Act, and expressly reserving the same; nevertheless answers said complaint as follows:

1. Answering paragraphs 1, 2 and 3, respondent admits the allegations therein contained.

[fol. 85] 2. Answering paragraph 4 and the subdivisions thereof, respondent admits that a strike commenced and called under the authority of said respondent Union started on May 10, 1939, by reason of differences between said parties.

3. Answering paragraph 4 (a), respondent denies the allegations therein contained.

4. Answering paragraph 4 (b), respondent admits that the strike now in progress between said parties has resulted in the interference with the company's production, but alleges that said concerted action of said respondent members was lawful in accordance with the rights of employees under the Wisconsin Anti-Injunction Act, and the constitutional rights of employees to free speech and other lawful conduct associated with the cessation of work due to a lawful labor dispute.

5. Answering paragraph 4 (c) the respondent denies that said Union has unlawfully committed the acts referred to.

6. Answering paragraph 4 (d), said respondent Union denies that its efforts to influence employees to remain united with said Union in a common bond of interest in order to obtain the objects for which said lawful labor dispute and strike was called, violates said section therein referred and further alleges that if the same constitutes a violation thereof, said section and the whole of said Wisconsin Employment Relations Act is void and unconstitutional in violation of the Constitution of the State of Wisconsin and of the United States, and particularly Article I, [fol. 86] Sections 1, 3 and 4 thereof, and of the Fifth and Fourteenth Amendments to the Constitution.

7. Answering paragraph 4 (e), said respondent denies the allegations thereof and further alleges that said respondent Union has aided members to obtain the defense to which they are entitled when accused of crime and has exercised such rights lawfully as it has a right to do under the laws of the State of Wisconsin and of the United States. That in so far as said Section 111.06 (2 a to j) makes the defense of members when accused of offenses an unlawful labor practice, such section is void and unconstitutional for the reasons aforementioned.

8. Answering paragraph 4 (f) said respondent denies the allegations thereof and further alleges that Section 111.06 (2 e) of the Wisconsin Statutes and the provisions thereof are void and unconstitutional.

As and for a separate defense, respondent alleges that the Wisconsin Employment Relations Act, Chapter 57 of the Laws of 1939, as applied to the respondent in this case, is in violation of the Constitution of the United States in that it deprives the respondent of its property and property rights without due process of law, and denies to said respondent the equal protection of the law, illegally interferes with interstate commerce, burdens and obstructs the free flow of interstate and foreign commerce and subjects the respondent and its members to harassing lawsuits and proceedings.

As and for further separate defense, respondent alleges [fol. 87] that said Wisconsin Employment Relations Act, Chapter 57 of the Laws of 1939, as applied to said Union and its members, is in violation of the Constitution of the State of Wisconsin and particularly Sections 1, 3 and 4 thereof.

Wherefore, respondent Union demands judgment dismissing the complaint on its merits.

Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, by Fred Wolter, President.

BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD

EXCERPTS FROM TRANSCRIPT OF HEARING

(Omitting formal parts)

Pursuant to notice, this matter came on for hearing before the Wisconsin Employment Relations Board at the courthouse, Milwaukee, Wisconsin, on June 19, 1939, beginning at 10:30 a. m.

Present: Chairman Henry C. Fuldner, Commissioner L. E. Gooding, Commissioner R. Floyd Green.

Appearances:

Complainant, by Lines, Spooner & Quarles, by W. J. McGowan and Leo Mann, attorneys.

Respondent, by Max E. Geline, Attorney.

[fol. 88] Mr. Geline: If the Board please, my name is Max Geline. I am appearing specially on behalf of the respondent in this matter before the Wisconsin Employment Relations Board, and object to the jurisdiction of the Wisconsin Employment Relations Board to proceed in this matter, and move that the complaint be dismissed upon the ground that the complainant, Allen-Bradley Company, of Milwaukee, Wisconsin, is engaged in an interstate and foreign commerce, and that by reason thereof is subject exclusively to the provisions of the National Labor Relations Act, an act of Congress, July 5th, 1935, Chapter 372.49 Stats., 349 U. S. Code, Title 29, Sections 151 to 166, and to the exclusive jurisdiction of the National Labor Relations Board, and that the Wisconsin Employment Relations Board is without jurisdiction to proceed on the complaint filed under and pursuant to the provisions of the Wisconsin Employment Relations Act for the reason that said act is in conflict with the National Labor Relations Act, and that the National Labor Relations Act is exclusive and permanent with respect to the matters set forth in complainant's complaint. We are filing this special appearance and motion to dismiss for the reasons given, and I would like to have an opportunity to present a brief argument in support of our motion. It won't be long, but I think a record ought to be made on that.

Mr. Gooding: I presume that Mr. Mann will stipulate that this company is engaged in interstate commerce. There is no question about that.

Mr. Mann: I would say this, if the Board please, that so [fol. 89] far as volume business is concerned, and purchases made by the company from sources outside of the State of Wisconsin, and sales made by the company to purchasers outside of the State of Wisconsin, there is no question at all that the Company is also subject to the jurisdiction of the Federal Labor Relations Board, and we will concede on the record that there is no question of fact with respect to interstate commerce that need be gone into in the proof.

Mr. Geline: For purposes of the record, I have an affidavit which, in effect, alleges the interstate commerce character of the business of the complainant company. I wonder, however, if, for purposes of the record, the company couldn't make—well, if it's part of the record it may be sufficient. My thought was, if they would somehow provide as part of their complaint the interstate character of their business, it might make the issue a little clearer for purposes of the future proceedings, if any.

Mr. Mann: I'll state on the record, if the Board please, that if the National Labor Relations Board, pursuant to charges filed, if any were filed, assumed the jurisdiction by issuing a complaint against the Allen-Bradley Company charging it with unfair labor practices under the federal act, that the company would concede the jurisdiction of the National Act to proceed in connection with such a complaint in so far as matters of interstate commerce are concerned. Doesn't that do what you want, Mr. Geline?

Mr. Geline: Yes, I think that is satisfactory.

[fols. 90-95] Mr. Mann: Our point, of course, is that the jurisdiction of the federal board is not exclusive. • • •

Transcript continued.

Excerpt from Transcript.

Mr. Geline: I am filing this motion to dismiss based on the special appearance and objection to jurisdiction and in the event the Board rules against respondent on motion; then we will file an answer reserving our rights without waiving our special appearance to the merit of the complaint.

Mr. Gooding: If you just file the written motions that you have, Mr. Geline.

Mr. Geline: Yes. After the Board renders an order, or wishes to dispose of this motion in some way, then I will proceed to file the answer, if necessary.

Mr. Gooding: The motion is being denied at this time.

[fols. 96-97] IN SUPREME COURT OF WISCONSIN

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, Fred Wokter, Esther Kusmierek, Esther Greenemeier, Sophie Kosciarski, Frances Chandek, Agnes Tanko, Harry Rose, Dan Rok-nich, Tony Calabresa, Edward Okulski, Peter Blazek, Eilif Tomte, Edward Larson and Mike Demski, Appel-lants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY, a Wisconsin Corporation, Respondents

Milwaukee Circuit Court, Opinion by Chief Justice Rosen-berry

JUDGMENT—January 7, 1941

This cause came on to be heard on appeal from the judg-ment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed.

Justice Nelson took no part.

[fol. 98] IN SUPREME COURT OF WISCONSIN

[Title omitted]

OPINION—Filed Jan. 7, 1941

Appeal from a judgment of the circuit court for Milwaukee county: Otto H. Breidenbach, Circuit Judge. *Affirmed.*

Labor relations. This action was begun on March 14, 1940, by Allen-Bradley Local No. 1111, United Electrical,

Radio and Machine Workers of America, Fred Wolter, Esther Kusmirek, Esther Greenemeier, Sophie Kosciarski, Francis Chandek, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabresa, Edward Okulski, Peter Blazek, Eilif Tomte, Edward Larson and Mike Demski, plaintiffs, against Wisconsin Employment Relations Board and Allen-Bradley Company, a Wisconsin corporation, defendants, to review an order of the Wisconsin Employment Relations Board, dated February 1, 1940. The Wisconsin Employment Relations Board, hereinafter referred to as the Board, answered the petition and filed a cross-petition praying that the order sought to be reviewed should be enforced as provided by law. The Allen-Bradley Company answered the petition and concurred in the prayer that the order sought to be set aside should be enforced. There was a trial and [fol. 99] judgment of the circuit court was entered on September 3, 1940, from which the plaintiffs appeal.

The Allen-Bradley Company is engaged in the business of manufacturing in the city of Milwaukee and it was stipulated by the parties that the Company is subject to the National Labor Relations Act. The Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, is a labor organization composed of the employees of the Allen-Bradley Company working in the city of Milwaukee.

Prior to the 1st day of May, 1939, there had been in force a contract between the company and the Union governing the terms and conditions of employment which contract was cancelled by the Union, cancellation to take effect as of the 30th day of April, 1939. On May 10, 1939, the Union by a secret ballot ordered a strike, pursuant to which a strike was called by the Union. After the strike was called on May 11, 1939, the Company continued to operate its plant for the duration of the strike which lasted about three months. Differences arose between the striking employees and the Company and those who continued to serve it. The Company thereupon filed a petition with the Board on July 27, 1939, charging the Union and certain of its officers and members with unfair labor practices. Notice of hearing was served which hearing was to be held on June 19, 1939. The Union answered, objecting to the jurisdiction of the Board, claiming that the matters in controversy were solely and exclusively within the jurisdiction of [fol. 100] the National Labor Relations Board. It then

answered generally ~~reserving~~ its objection to the jurisdiction. Hearing was had before the Board in which testimony was taken, and on the first day of February, 1940, the Board made its final order. The findings of fact made by the Board upon which its final order is based are not attacked on this appeal. Briefly, from the findings the following facts appear:

(a) Appellants engaged in mass picketing at all entrances to the premises of the Company for the purpose of hindering and preventing the pursuit of lawful work and employment by employees who desired to work.

(b) They obstructed and interfered with the entrance to and egress from the factory and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory.

(c) They threatened bodily injury and property damage to many of the employees who desired to continue their employment.

(d) They required of persons desiring to enter the factory, to first obtain passes from the Union. Persons holding such passes were admitted without interference.

(e) They picketed the homes of employees who continued in the employment of the company.

(f) That the Union by its officers and many of its members injured the persons and property of employees who desired to continue their employment.

(g) That the fourteen individual appellants who were striking employees, had engaged in various acts of misconduct. The facts relating to those were found specifically. [fol. 101] The acts consisted of intimidating and preventing employees from pursuing their work by threats, coercion, and assault; by damaging property of employees who continued to work; and as to one of them by carrying concrete rocks which he intended to use to intimidate employees who desired to work.

Based upon these findings the Board found as conclusions of law, that the Union was guilty of unfair labor practices in the following respects:

(a) Mass picketing for the purpose of hindering and preventing the pursuit of lawful work.

(b) Threatening employees desiring to work with bodily injury and injury to their property.

(c) Obstructing and interfering with entrance to and egress from the factory.

(d) Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory.

(e) Picketing the homes of employees.

As to the fourteen individual appellants, the Board concluded that each of them was guilty of unfair labor practices by reason of threats, assaults and other misdemeanors committed by them as set out in the findings of fact.

Based upon its findings of fact and conclusions of law the Board ordered that the Union, its officers, agents and members

(1) Cease and desist from:

(a) Mass picketing.

(b) Threatening employees.

(c) Obstructing or interfering with the factory entrances.

(d) Obstructing or interfering with the free use of public [fol. 102] streets, roads and sidewalks.

(e) Picketing the domiciles of employees.

The order required the union to post notices at its headquarters that it had ceased and desisted in the manner aforesaid and to notify the Board in writing of steps taken to comply with the order.

As to the fourteen individual appellants, the order made no determination based upon the finding that they were individually guilty of unfair labor practices.

As already stated, the controversy was brought before the circuit court on a petition to review. After hearing and argument in the circuit court, judgment was entered September 3, 1940, sustaining, confirming and enforcing the order of the Board, from which judgment plaintiffs appeal.

[fol. 103] ROSENBERRY, C. J.:

Upon this appeal no question is raised as to the constitutionality of the Wisconsin Employment Peace Act, pur-

suant to which the proceeding under consideration was had, except that it is in conflict with the National Labor Relations Act. Stated in the language of the brief, the appellants contend

"That the Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce."

Appellants further contend that the finding of the Board that the fourteen strikers were guilty of unfair labor practices, is unconstitutional because it is so in conflict with regulations of the National Act governing the employe status of the fourteen strikers that the employe sections of the two acts cannot consistently stand together. While appellant used the term "unconstitutional," their argument is that the state law can have no application to a manufacturer subject to the National Labor Relations Act because the jurisdiction of the National Labor Relations Act has preempted the field of labor relations in cases where the employer is carrying on an industry in interstate commerce.

We enter upon an examination of the contentions of the plaintiffs and the arguments made in support thereof fully aware that we are dealing with one of the most difficult as well as delicate questions presented to the courts of this [fol. 104] country, to-wit: the delimitation of the power of the state and the federal government over a matter which is subject to some extent to their concurrent jurisdiction. The line of demarcation between the federal and state power is not a straight line. It is not only irregular but it is subject to change. The extent of state jurisdiction in some fields depends upon whether the field has been occupied by federal authority. Areas not thought to be within the scope of federal power originally may be brought within it by economic and social changes. Neither the state nor the federal constitutions change but the subject matter to which they are applied changes and so a new and different result is reached by the application of constitutional principles. See *Home Bldg. & Loan Assn. v.*

Blaisdell (1933), 290 U. S. 398, 88 A. L. R. 1519, Note, Governmental powers in peace-time emergencies.

Yet "the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *Labor Board v. Jones & Laughlin* (1936), 301 U. S. 1, 30.

We shall first consider the purpose and scope of the National Labor Relations Act for the reason that wherever it applies, it excludes state action from the occupied field. Upon this proposition there is no disagreement. We shall also endeavor to determine when and under what circumstances it applies in a particular case.

While appellants recognize the fact that the National Labor Relations Act was enacted to remove burdens and prevent obstruction to the free flow of interstate commerce, they continually assert that the act confers substantive rights upon individual workers and the unions into which they are organized. Upon the basis of this proposition they argue that if there is any difference in the provisions [fol. 105] of the two acts as to what are unfair labor practices or the remedies which may be applied by the boards, there is a necessary and fatal repugnancy between the acts.

The Supreme Court of the United States in *Labor Board v. Jones & Laughlin*, *supra*, speaking of interstate commerce, said:

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. (p. 37)

"The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel. * * * The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce

* Here and throughout the opinion italics are by the writer.

its employees with respect to their self-organization and representation, and, on the other hand, the board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." (pp. 45, 46)

It is manifest from these and other declarations of the United States Supreme Court in the consideration of the provisions of the National Labor Relations Act that the federal government can proceed only so far with the regulation of labor relations as is necessary to protect interstate commerce, remove burdens from it and prevent obstructions to it. The more study one gives to the National Labor Relations Act, the more he is moved to admire the consummate skill with which it was drafted for the declared purpose of regulating and protecting interstate commerce and yet at the same time leaving the field of proper state action unrestricted so far as possible. A reading of the cases which have arisen in the course of the administration [fol. 106] of the act, lead one to the conclusion that such defects as exist are defects of administration rather than defects in the law itself. The conduct of employees, although not denominated "unfair labor practices" by the act, is considered important in determining the character of the employers' acts by the National Labor Relations Board as well as the courts.

In the declaration of policy contained in the National Labor Relations Act, it is said:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

By the National Labor Relations Act the Board is given two principal functions: the first is defined by sec. 9, which as enacted is headed "Representatives and elections"; the second is defined by sec. 10, which as enacted, is headed

"Prevention of unfair labor practices". In sec. 9 the Board is empowered after appropriate investigation and hearing to certify the name or names of representatives for collective bargaining of an appropriate unit of employees. By sec. 10 the Board is authorized to prevent by order, after hearing, and by a further appropriate proceeding in court, unfair labor practices as defined in sec. 8 of the act. The power of the Board to certify under sec. 9 the name or names of representatives for collective bargaining is not [fol. 107] involved in this proceeding. It is apparent, however, from a consideration of the provisions of sec. 9 that the right to determine and certify the name or names of a person or persons who shall represent an appropriate unit of employees for the purpose of collective bargaining, is vested exclusively in the board.

In *A. F. of L. v. Labor Bd.* (1940), 308 U. S. 401, the United States Supreme Court had before it for determination the question whether a certification made by the Board pursuant to the provisions of sec. 9 was subject to review by the Circuit Court of Appeals of the proper circuit. The Court held:

"The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in sec. 9 (d). (Upon a petition for the enforcement or review of an order under sec. 10 (c), an order made pursuant to sec. 9 (c) may be reviewed.)"

By sec. 10 (a) it is provided that

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

By sec. 10 (b) it is provided that whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board or any agent or agency designated by the board for such purpose, shall have power

to issue and cause to be served upon such person its complaint, stating the charges, etc.

By sec. 10 (c), it is provided:

"If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring [fol. 108] such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

Under the provisions of the act, the power to forbid unfair labor practices and to require reinstatement of employees is vested exclusively in the Board and this power may not be affected by any other means of adjustment or prevention. It seems clear from these provisions that the right sought to be vindicated is the right to have interstate commerce free from burdens and obstructions. This is apparent not only from the language of the act but from the decision of the United States Supreme Court in *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940), 309 U. S. 261, 84 L. Ed. 493. In that case, the union which had been a party to a labor dispute sought to have the Consolidated Edison Company and its affiliated companies adjudged in contempt for failure to comply with certain requirements of the decree made in the case to which it was a party. The Court of Appeals denied the application on the ground that "petitioner had 'no standing to press a charge of civil contempt, if contempt had been committed.'"

The Supreme Court of the United States cited excerpts from the committee reports of both houses of Congress and said:

"We think that the provision of the National Labor Relations Act conferring exclusive power upon the board to prevent any unfair labor practice, as defined,—a power not affected by any other means 'of prevention that has been or may be established by agreement, code, or law, or otherwise,' necessarily embraces exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. It is the

Board's order on behalf of the public that the court enforce. [fol. 109] It is the Board's right to make that order that the court sustains. *The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy.'* Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention."

The Court affirmed the decision of the Circuit Court of Appeals. See also *Fur Workers Union Local No. 72 v. Fur Workers Union*, 105 Fed. (2d) 1.

It is obvious that the purpose of the National Labor Relations Act is to promote the free flow of interstate commerce by the prevention of unfair labor practices as defined in the act. The regulation of interstate commerce is the constitutional basis of the power of Congress over labor relations. Prior to the adoption of the National Labor Relations Act and the decision of the United States Supreme Court sustaining it, many persons supposed labor relations to be a subject reserved to the states by the Tenth Amendment to the Constitution of the United States and that it was beyond the competency of Congress to deal with the subject. No doubt it is because of that fact that the act so meticulously delimits the power and authority of the Labor Board to matters which substantially affect interstate commerce, that being a subject over which Congress has, when it is exercised, exclusive jurisdiction. Hence Congress does not seek in the National Labor Relations Act to deal with labor relations generally. It deals with labor relations only so far as in its opinion it is necessary to protect interstate commerce from being impeded or obstructed by unfair labor practices on the part of employers. [fol. 110] The act prescribes a procedure for the protection and enforcement of the right of employees for self-organization, to bargain collectively, and to engage in collective activities as enumerated in sec. 7, for the purpose of protecting interstate commerce and to that end it confers large discretionary power upon the National Labor Relations Board. The rights enumerated in sec. 7 were in existence before the act was passed. If the act were to be repealed these rights would still exist. No one would more promptly assert that fact than the representatives of labor.

In *Amalgamated Util. W'rk's v. Consol. Edison Co.*, *supra*, the Supreme Court of the United States, referring to sec. 7 of the Act, said:

"Neither this provision, nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Bd. v. Jones & L. Steel Corp.*, 301 U. S. 1, 33, 34, 81 L. ed. 893, 909, 910, 57 S. Ct. 615, 108 ALR 1352, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents;' that discrimination and coercion 'to prevent the free exercise of the right of employees to self-organization and representation' was a proper subject for condemnation by competent legislative authority. We noted that 'long ago' we had stated the reason for labor organizations,—that through united action employees might have 'opportunity to deal on an equality with their employer,' referring to what we had said in *American Steel Foundries v. Tri-City Central Council*, 257 US 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 ALR 360. And in recognition of this right, we concluded that Congress could safeguard it in the interest of interstate commerce and seek to make appropriate collective action 'an instrument of peace rather than of strife.' To that end Congress enacted the National Labor Relations Act."

In determining whether the Employment Peace Act is repugnant to the provisions of the National Labor Relations Act, it is of little moment whether we say that the National Act confers rights and privileges upon employees [fol. 111] or organizations of employees, or how we describe its effect upon employees. Both from the language of the act and the construction which has been placed upon it by the United States Supreme Court, it is apparent that the act operates effectively in a particular case only in the way and to the extent which is determined by the orders of the National Labor Relations Board. If an employer indulges in any of the unfair labor practices described in sec. 8 of the act, the sole redress of the employees is to charge the employer with such unfair labor practices before the Board. When such a charge is made, the Board may or may not

in its discretion decide to take jurisdiction of the controversy. Its determination will depend upon whether it finds the situation is such as to substantially affect interstate commerce. When it acts, the order of the Board determines the manner in which and the extent to which the act shall be effectively applied to the particular situation being dealt with. If the determination of the Board together with the force of public opinion is not sufficiently persuasive to bring about compliance with the Board's order, the Board may then apply to the proper circuit court of appeals for enforcement of the order. In this respect it differs materially from the transportation act of 1920, ch. 91, 41 Stat. 456. Under that act "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding." *Labor Board Case*, 261 U. S. 72, 79. See *Penna. Brotherhood v. P. R. R. Co.*, 267 U. S. 219.

The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts but is one of jurisdiction between the state and federal governments. Inasmuch as the National Labor Relations [fol. 112] Act depends for its effective operation upon the determination of the National Labor Relations Board, there can be no conflict between the acts until they are applied to the same labor dispute. They are upon two different planes. The National Labor Relations Act deals with labor relations only as a means of protecting interstate commerce. The Employment Peace Act deals with labor relations in the exercise of the police power of the state. To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding.

In this case the employer has never been charged with an unfair labor practice nor has the National Labor Relations Board ever been requested to determine who is the

proper bargaining representative. Consequently the National Labor Relations Act has never been applied to the labor dispute here under consideration and it may never be applied, depending upon the exercise of the discretion of the National Labor Relations Board. Therefore, there can be no conflict of jurisdiction between state and federal authority in this case. This conclusion does not depend upon the language of the two acts. If the language of the Employment Peace Act was identical with that of the National Labor Relations Act and in a particular case the [fol. 113] National Labor Relations Board took jurisdiction, the jurisdiction of the Wisconsin Employment Labor Relations Board would be ousted notwithstanding the identity in language of the two acts and the determination made by the National Labor Relations Board would be controlling. The action of Congress leaves to the state full authority to deal with labor relations generally. Congress exercises its power in the interest of interstate commerce. With that subject the state has nothing to do. Its power to regulate labor relations is derived from an entirely different source, —the power to promote the peace, morals, health, good order and general welfare of the people as a whole. It may not, however, in the exercise of that power encroach upon the federal domain.

The appellants, while asserting that they do not do so, in fact argue this case as if the failure of Congress to define unfair labor practices of employees operates as a license to employees in the enforcement of their demands to do any or all of the things declared by the Employment Peace Act to be unfair labor practices. This argument stems from the idea that Congress is regulating labor relations instead of interstate commerce. In *National Labor Relations Bd. v. Fansteel Metallurgical Corp.* (1939), 306 U. S. 240, 256, the Supreme Court of the United States said:

“Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the union committee ‘to take over and hold two of the respondent’s key buildings’. It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of the ‘right to strike’ to which the act referred. It was not a mere quitting of work and statement of grievances in the exercise of pres- [fol. 114] sure recognized as lawful. It was an illegal

seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. *When the employees resorted to that sort of compulsion they took a position outside of the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve . . .*

"We repeat that the fundamental policy of the act is to safeguard the rights of the self-organization and collective bargaining and thus, by the promotion of industrial peace, to remove obstructions to the free flow of commerce as defined in the act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees rights."

It is considered that at this determination by the Supreme Court of the United States disposes of the contention made.

One of the principal contentions of appellants here is that fourteen strikers who were found guilty of unfair labor practices (acts of violence and coercion) are, under the terms of the National Labor Relations Act, still employees of the Allen-Bradley Company; that because of the finding of the Wisconsin Employment Relations Board that the employees were guilty of an unfair labor practice, that relationship is severed, consequently there must be a conflict between state and federal authority. There are two answers to this contention, first, the National Labor Relations Act has never been applied to the labor dispute here under consideration; second, a mere finding of the Wisconsin Employment Relations Board does not affect the employer and employee relationship. Appellants' contention is based upon sec. 111.02 (3) of the Wisconsin Employment Peace Act. That part which is material is as follows:

[fol. 115] "The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly

indicates otherwise; and shall include any individual * * * (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder."

Considering the language of this section by itself, it may warrant the interpretation put upon it by appellants, that is, that a mere finding is sufficient to deprive the employee of his status. However, when considered in connection with other provisions of the act, we think it cannot be so interpreted. That part of sec. 111.07 (4), which is material here, is as follows:

"Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, *as the Board may deem proper.*"

The continuation of the status of an employee is certainly a right or privilege. The act specifically provides how it shall be terminated, that is, by order of the Board.

Sec. 111.07 (8), stats., provides:

"Within thirty days from the date of the order of the board as a body, any party aggrieved thereby may petition the circuit court for the county in which he or any party resides or transacts business, *for review of the same.*"

No provision is made for reviewing the findings. Under sec. 111.07 (7 & 8), Employment Peace Act, the Court has power only "to confirm, modify or set aside the order of the board and enter an appropriate decree". It examines the record to ascertain whether the findings are supported by the evidence. Its judgment may operate only upon the provisions of the order. It is considered, in view of the large discretionary power committed to the Board, that the act affects the rights of parties to a controversy pending before the Board only in the manner and to the extent prescribed by the order. As pointed out in *Hotel & Restaurant [fol. 116] Employees Assn., Local 122, et al. v. Wisconsin Employment Relations Bd. et al.*, — Wis. —, — N. W. —, the jurisdiction of the Wisconsin Board over labor disputes is

to some extent concurrent, it being provided in sec. 111.07 (1), Stats.:

"But nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction . . .

(4) Final orders may dismiss the charges", etc.

As already stated, the manner and the extent to which the act shall apply in a particular case pending before it is committed to the discretion of the Board. Its commands are found in the order, which determines the status and obligations of all parties to the controversy, not in the findings. In the Board's order under review, there is no provision which suspends the status as employees of the fourteen individual appellants found guilty of unfair labor practices. In this case for the reasons stated there is no conflict in regard to employe status.

In response to the argument made by appellants that there is a conflict between the two acts because of the difference in definitions, we point out that these definitions apply only for the purposes of the act in which they are found. In sec. 2 of the National Labor Relations Act certain terms used in the act are defined. That section begins "When used in this act", the various terms defined mean thus and so. Definitions of terms in the Employment Peace Act are found in sec. 111.02. That section begins: "When used in this chapter", the term defined includes or means thus and so. In controversies in which the National Labor Relations Board takes jurisdiction, it will in the course of its determination apply the definitions contained in the National Labor Relations Act. When the Wisconsin Employment Relations Board takes jurisdiction of a labor dispute it will apply the definitions contained in the Employment Peace Act in formulating its determinations. Conflict between the two acts can arise only with respect to orders issued by each of the Boards dealing with the same situation. No matter how arrived at by the boards there can be no conflict if there is none in the orders dealing with the same labor dispute. For the reason stated we discover no conflict in the two acts on account of the difference of definitions of the terms to be found in them.

When appellants concede that the state may punish unlawful acts of strikers who are engaged in striking because of unfair labor practices of their employer, they con-

cede the power of the state to deal with some aspects of every labor dispute. In the case of the National Labor Relations Act the jurisdiction of the federal authority is not aroused until such a situation has arisen that interstate commerce is impeded or obstructed. On the other hand, state action is regulatory in its nature and is designed to bring about industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services for the promotion of the general welfare. The federal act deals with a situation that has arisen. The state act seeks to forestall action which may lead to disorder and loss of life and property.

Appellants specified nine ways in which the state and federal acts conflict but as already pointed out, these conflicts do not exist until the National Labor Relations Act is applied by the National Labor Relations Board in a particular case. As has already been pointed out state power is not destroyed by federal action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by the National Labor Relations Act. Its power is suspended so far as is necessary to give effect to that act.

We might have disposed of this case when we reached the conclusion that the Federal Act not having been invoked with respect to the labor dispute here under consideration, there can be no conflict between the two acts. We have thought it best, however, in the interest of certainty to deal specifically with certain questions raised by appellants. If the National Labor Relations Act is repealed, the power of the state over labor relations will be the same as it was before the act was passed. If the Interstate Commerce Act should be repealed the state's power over interstate commerce would not be enlarged. It might have greater latitude in dealing with intra-state commerce but its jurisdiction would be over intra-state commerce, not over interstate commerce.

We wish to point out again that the court has no jurisdiction or authority to pass upon the policy involved in this or any other act. Questions of public policy are primarily for the legislature. If the provisions of this act are

too restrictive, as claimed in the brief, the court may not deal with that feature of the act if it is otherwise within the field of constitutional legislative action. In upholding the law against attacks upon its validity on the ground that it is unconstitutional, the court neither commends nor criticizes the public policy involved. If the act is too restrictive, the remedy lies with the legislature and not with the court.

By the Court.—Judgment affirmed.

[fol. 120] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed January 21, 1941

Now come the appellants above-named by Max E. Geline, their attorney, and respectfully move the Court for a rehearing in the above-entitled matter, for, among others, the following reasons, to-wit:

1. The Court erred in ruling that the National Labor Relations Act was not presently effective as to the parties to this action because no order has been issued by the National Labor Relations Board and that, therefore, no issue of repugnance is involved in the instant case in the terms and provisions of the two Acts.

2. The Court erred in construing that the National Labor Relations Act grants to the National Labor Relations Board the discretion to take jurisdiction of any controversy involving the commission of unfair labor practices by an employer against employees as defined in said Act and in, further, assuming that if the National Labor Relations [fol. 121] Board does not act in a matter, the Act, itself, is not applicable to employers and employees engaged in interstate commerce.

3. The Court erred in ruling that—

“In the case of the National Labor Relations Act the jurisdiction of the Federal authority is not aroused until such a situation has arisen that interstate commerce is impeded or obstructed.”

4. The Court erred in ruling that the conflict between the State Act and the Federal Act does not exist until the National Labor Relations Act is applied by the National Board in a particular case.

5. The Court erred in construing that the "Final Order" subject to review did not include those portions of the "Final Order" of the Board containing the ruling that the fourteen appellants had committed unfair labor practices and, further, erred in assuming that it could only review that portion of the "Final Order" which was designated "Order".

6. The Court erred in ruling that the action of Congress in enacting the National Labor Relations Act leaves to the State full authority to deal with labor relations of employers engaged in interstate commerce, generally, without regard to whether the State law regulating the same subject as the Federal law is inconsistent with or in conflict with the Federal law.

7. The Court erred in asserting that Congress, in enacting the National Labor Relations Act, did not regulate labor relations as such.

8. The Court erred in ruling that in order for the appellants to sustain a loss of employee-status for purposes of protection against employer unfair labor practices and, [fol. 122] further, for the purpose of participating as employees in all questions of collective bargaining governed by the Wisconsin Act, that it was necessary for the Wisconsin Board to order the termination of the employee-status for such purposes after finding that the appellant employees had committed unfair labor practices in the course of the strike.

9. The Court erred in assuming that the employer-employee relationship is severed by the commission of unfair labor practices when, in fact, the only real effect of enforcement of the statute against one committing unfair labor practices is to terminate his employee status for all purposes of the Wisconsin Act only.

10. The court erred in quoting the language in sec. 111.02 (3) of the Wisconsin Act, material to the issues of this case, by omitting the clause:

"whose employment has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer", in designating the individuals covered by sec. 111.02 (3) (b).

11. The Court erred in construing the Wisconsin Act to permit the exercise of discretion provided for in sec. 111.07 (4) of the Act with respect to strikers whom the Board has found to have committed an unfair labor practice.

12. The Court erred in assuming that the termination of the employee-status of strikers for purposes of the Wisconsin Act, who committed an unfair labor practice under the Act, is one and the same as the termination of the actual employment relationship for all purposes.

13. The Court erred in failing to rule that the employee-[fol. 123] status of the fourteen individual appellants for the limited purposes of the Wisconsin Act was terminated.

14. The Court erred in ruling that conflict between the two Acts can arise only with respect to orders issued by each of the Boards dealing with the same situation.

15. The Court erred in ruling that appellants are without standing to raise constitutional issues arising from conflict between the two Acts because the National Act constitutes a public law and does not confer a private right of action.

16. The Court erred in failing to consider the question of conflict between the terms and provisions of the two Acts insofar as the Wisconsin Act attempts to regulate the labor relations of employers, employees and labor unions engaged in interstate commerce.

17. The Court erred in ruling that the conflict between the State and Federal Acts as to any particular case does not exist until the National Act is applied by the National Labor Relations Board in a particular case.

18. The Court erred in ruling that in the event of conflict between the two Acts so that the two Acts cannot consistently stand together, the State power is not destroyed by reason of the Federal Act but is merely suspended in a particular case.

19. The Court erred in failing to apply simple, clear, fundamental constitutional principles regulating the authority

of the State and Federal Governments to regulating the same subject, to the issues raised in this case.

And for such other reasons and other grounds as will be set forth in the printed argument hereinafter to be filed for the appellants in support hereof.

Max E. Geline, Attorney for Appellants.

Dated, January 20th, 1941.

[fol. 124] The undersigned hereby acknowledge receipt of copy of Petition for Rehearing in the above matter.

Dated this 21st day of January, 1941.

John E. Martin, Atty. Gen. *By N. S. Boardman, Asst. Atty. Gen.* Attorneys for Respondent, Wisconsin Employment Relations Board.

[fols. 125-126] The undersigned hereby acknowledge receipt of copy of Petition for Rehearing in the above matter.

Dated this 24th day of January, 1941.

Lines, Spooner & Quarles, Attorneys for Respondent, Allen-Bradley Company.

[fols. 127-132] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—March 11, 1941

The Court being now sufficiently advised of and concerning the motion of the said Appellants for a rehearing in this cause, it is now here ordered and adjudged by this court that said motion be, and the same is hereby, denied, with \$25.00 costs and costs of motion.

[fol. 133] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 2, 1941

The appellants above named in accordance with Rule 9 of the Revised Rules of the Supreme Court of the United

States, assign the following errors in the record and proceedings in the Supreme Court of the State of Wisconsin in the above entitled cause:

1. The Supreme Court of the State of Wisconsin erred in failing to rule that the Wisconsin Employment Peace Act on its face and as construed and applied to the appellants, is repugnant to the National Labor Relations Act, and therefore void and unconstitutional under Article I, Section 8 and Article II, Section 6 of the Constitution of the United States.

2. The Supreme Court of the State of Wisconsin erred in ruling and construing that the Wisconsin Employment Peace Act (C. 571 Laws of 1939, Wisc. Stat. (1939) c. 111) could be enforced as to parties subject to the National Labor Relations Act.

[fol. 134] 3. The Supreme Court of the State of Wisconsin erred in construing the National Labor Relations Act as not being applicable to the appellants until and unless an order is issued by the National Labor Relations Board in a proceeding before it to which the employer, employees and the Union herein are parties.

4. The Supreme Court of the State of Wisconsin erred in ruling that jurisdiction of the federal authority under the National Labor Relations Act is not aroused until such a situation has arisen that interstate commerce is impeded and obstructed.

5. The Supreme Court of the State of Wisconsin erred in ruling that the final order of the Wisconsin Employment Relations Board finding the fourteen individual appellants herein guilty of unfair labor practices did not deprive said appellants of the protection against employer unfair labor practices and of the right to collective bargaining and other concerted action for their mutual aid and protection.

6. The Supreme Court of the State of Wisconsin erred in ruling that Sec. 111.02, Subsection 3, (b) of the Wisconsin Employment Peace Act is not in conflict with Section 2, Subsection 3 of the National Labor Relations Act, as applied to the individual appellants in this case and the appellant union and therefore is void and unconstitutional by reason of such conflict.

7. The Supreme Court of the State of Wisconsin erred in failing to rule that the Wisconsin Employment Peace Act on its face and as construed and applied to the appellants is void and unconstitutional for the reason that the said Wisconsin Act and the National Labor Relations Act are both regulatory of the same general subject matter of employer-employee relations and both regulate collective bargaining relations between employers and employees, and that Congress in enacting the said National Labor Relations Act has preempted the subject covered by said Act in the exercise of its powers to regulate interstate commerce.

[fols. 135-136] 8. The Supreme Court of the State of Wisconsin erred in ruling that appellants are without standing to raise constitutional issues arising from the conflict between the two aforesaid federal and state labor relations acts.

9. The Supreme Court of the State of Wisconsin erred in ruling that the Wisconsin Employment Peace Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the National Labor Relations Act pursuant to its constitutional power to regulate commerce between the states.

Prayer for Reversal

For which errors, the appellants pray:

1) That the decision of the Supreme Court of the State of Wisconsin filed January 7th, 1941 in the above entitled cause be reversed;

2) That the final judgment issued pursuant to said decision be reversed;

3) That a judgment be rendered in favor of the appellants and for costs.

Lee Pressman, Joseph Kovner, Anthony Wayne Smith, Attorneys for Appellants.

Of Counsel: Max E. Geline.

[fol. 137] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—June 2, 1941

The Appellants in the above-entitled matter, having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled matter by the Supreme Court of the State of Wisconsin on the 7th day of January, 1941, and from each and every part thereof; and

The appellants having presented their petition for appeal, assignment of errors, prayer for reversal, and statement of jurisdiction, pursuant to the statute and rules of the Supreme Court of the United States in such cases made and provided:

It Is Now Ordered That an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above-entitled cause, as provided by law; and

It Is Further Hereby Ordered That the Clerk of the Supreme Court of the State of Wisconsin shall prepare and [fols. 138-209] serve a transcript of the record, proceedings, and judgment in this cause and transfer the same to the Supreme Court of the United States so that he shall have the same in said Supreme Court within 40 days of this date; and

It Is Further Hereby Ordered That security for costs on appeal be fixed in the sum of One Hundred (\$100) Dollars.

Dated this 2nd day of June, 1941.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal.)

[fol. 210] SUPREME COURT OF THE UNITED STATES

No. 252

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 11, 1941

Now come the appellants in the above entitled cause and state that the points upon which each and all intend to rely in this Court are as follows:

1. The Wisconsin Employment Peace Act, (Ch. 57, Laws of 1939, Wis. Stat. 1939, Ch. 111) and the National Labor Relations Act are general public laws enacted respectively by the Wisconsin Legislature and Congress for the purpose of regulating the same subject of labor relations and collective bargaining.

2. The Wisconsin Act, on its face, and as construed and applied to interstate commerce, is repugnant to the National Act and therefore, void and unconstitutional.

3. Congress, in enacting the National Labor Relations Act pursuant to its powers under the commerce clause, has [fol. 211] pre-empted the subject of labor relations insofar as governed by the National Act; the states, are therefore barred from enforcing a Labor Relations Act governing the same subject as to employers, employees, and labor organizations which are subject to the jurisdiction of the National Act.

4. If the states may enact labor relations legislation governing the same subject as the National Act; pursuant to the police power, the Wisconsin Employment Peace Act, involved in this appeal, is nevertheless void and unconstitutional as applied to interstate commerce because the State Act, in its provisions and public policy, is so in conflict with and repugnant to the public policy and provisions of the National Act that the two acts cannot consistently stand together.

5. The Wisconsin Act is an integrated and indivisible plan of regulation of the subject of labor relations and cannot be separated for the purpose of upholding some portion of the Final Order issued as valid and constitutional as applied to appellants.

6. The Wisconsin Employment Relations Board was wholly without jurisdiction to issue a valid order; consequently, the Final Order in this case is void and of no effect.

7. The Final Order dated February 1, 1941, as construed and enforced in the Wisconsin Court against appellants as striking employees, is repugnant to and in conflict with the provisions of Section 2 (3) of the National Act.

8. Section 111.02 (3) and Section 111.06 (2), Wisconsin Act, as applied and enforced in the Final Order are repugnant to and in conflict with the provisions of Section 2 (3) and the public policy set forth in Section 1 of the National Act.

9. The Wisconsin Supreme Court, in its decision of January 7, 1941, erred in its construction of the purpose, applicability to the parties and effect of the National Labor Relations Act on the right of the State Board to enforce the State Act.

10. The Final Order of the Wisconsin Board, confirmed by the Wisconsin Courts, would permit the appellee, Allen-Bradley Company, to ignore the statutory protection presently existing in favor of the striking employees under the National Labor Relations Act.

11. The Final Order of the Wisconsin Board and the Wisconsin Employment Peace Act as applied to interstate commerce stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the National Labor Relations Act pursuant to its constitutional power to regulate commerce between states.

Appellants further state that only the following parts of the record as filed in this court are deemed necessary to be printed for the consideration of the points set forth above, viz:

<i>Title of Paper</i>	<i>Record Page</i>
Petition for Review of Final Order	2-19
Final Order of Wisconsin Board, dated February 1, 1940	20-26
Answer and Cross Petition for Enforcement of Final Order of Wisconsin Board	26-33
Answer of Allen-Bradley Company	50-52
Decision of Circuit Court Judge, Otto H. Breidenbach, July 16, 1940	53-55
Final Judgement of Circuit Court	56-58
[fol. 213] Complaint of Allen-Bradley Company against Allen-Bradley Union	78-82
Objections of Allen-Bradley Union to jurisdiction of Wisconsin Board and Motion to Dismiss Complaint	83-84
Answer of Allen-Bradley Union filed in proceedings before Wisconsin Board	85-87
Excerpts from Transcript	87-90
Judgment of Wisconsin Supreme Court	96
Opinion of Wisconsin Supreme Court	97-118
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Denial of Motion for re-hearing	127

Dated, Milwaukee, Wisconsin, the eighth of July, 1941.
Lee Pressman, John Kovner, Anthony Wayne Smith,
Attorney for Appellants. Max E. Geline, Attor-
ney for Counsel.

Endorsed on Cover: Enter Lee Pressman. File No.
45,580. Wisconsin Supreme Court, Term No. 252. Allen-
Bradley Local No. 1111, United Electrical, Radio and Ma-
chine Workers of America, et al., Appellants, vs. Wisconsin
Employment Relations Board and Allen-Bradley Company.
Filed July 10, 1941. Term No. 252, O. T. 1941.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, ET AL.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

**LEE PRESSMAN,
JOSEPH KOVNER,
ANTHONY WAYNE SMITH,**
Counsel for Appellants.

MAX E. GELINE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, FRED WOLTER, ESTHER KUSMIEREK, ESTHER GREENEMEIER, SOPHIE KOSCIERSKI, FRANCES CHANDEK, AGNES TANKO, HARRY ROSE, DAN ROKNICH, TONY CALABRESA, EDWARD OKULSKI, PETER BLAZEK, EILIF TOMTE, EDWARD LARSON AND MIKE DEMSKI,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY, A WISCONSIN CORPORATION,

Appellees.

STATEMENT AS TO JURISDICTION.

The appellants herewith submit their statement, pursuant to Rule 12 of this Court, showing that the appeal in the above-entitled cause is properly before this Court.

Opinions Below.

The Circuit Court issued two opinions, one upon the enforcement of the interlocutory order of the Wisconsin Employment Relations Board, dated December 14th, 1939 (C. 60, R. 111). The second opinion of the Circuit Court,

dated July 16th, 1940, was issued upon the enforcement of the final order of the Wisconsin Employment Relations Board (C. 53, R. 61). Copies of each of these opinions are appended to the statement and marked Exhibits A and B, respectively. The opinion of the Wisconsin Supreme Court is reported in 237 Wis. 164, 295 N. W. 791; and is appended hereto and marked Exhibit C.

Jurisdiction.

1) STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13th, 1925, January 31st, 1928, and April 26th, 1928.

2) STATE STATUTE DRAWN INTO QUESTION AND DECISION IN FAVOR OF ITS VALIDITY.

The statute involved in this case is the Wisconsin Employment Peace Act (C. 57 Laws of 1939, Wis. Stat. (1939) c. 111, pp. 1610-18). This statute is a general public law seeking to regulate the subject of rights and duties of employers and employees and labor organizations in businesses engaged in interstate commerce and intrastate commerce, with reference to matters of the self-organization of employees for purposes of collective bargaining, and collective bargaining between employers and employees. The appellants have drawn into question the entire Act on the ground that in its entirety it is repugnant to the commerce clause of the Federal Constitution and the National Labor Relations Act.

Among other matters, the Wisconsin Employment Peace Act defines the employee status and sets forth unfair labor practices for employers, employees, and labor organizations, including employers and employees and labor organizations subject to the National Labor Relations Act.

Section 111.02, Subsection (3) of said Wisconsin Act defines an employee as follows:

"111.02 Definitions. When used in this chapter: (3) The term 'Employee' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin, in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and . . . who has not been found to have committed or to have been a party to any unfair labor practice hereunder."

Under and pursuant to section 111.02, subsection (3) (b), employee strikers who have been found to have committed, or to have been a party to, any unfair labor practices lose their status as employees for the purposes of the Act. The unfair labor practices therein referred to, and particularly relevant here, are contained in section 111.06, subsection (2), and are as follows:

"2. It shall be an unfair labor practice for an employee individually or in concert with others:

a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04 or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

e) To cooperate in engaging in, promoting or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

j) To commit any crime or misdemeanor in connection with any controversy as to employment relations."

In addition to the foregoing sections, the appellants particularly challenge Section 111.01 relating to the public policy of the Wisconsin Act; Section 111.02 (6) setting forth the definition of an appropriate bargaining unit; Section 111.02 (8) setting forth the definition of a labor dispute; Section 111.04 setting forth the rights of employees; Section 111.06 (1) setting forth the unfair labor practices of employers; and Section 111.06 (3) relating to the unfair labor practices of unions.

3) FINALITY OF JUDGMENT.

The judgment forming the basis of the appeal herein is final both in form and in substance, and disposes of all of the elements of the controversy in the court below. The judgment confirms the validity of the Wisconsin Employment Peace Act on its face and as applied to the appellants and affirms the final judgment of the Circuit Court of Milwaukee County, enforcing the final Order of the Wisconsin Board.

4) APPEAL TIMELY TAKEN.

The judgment from which this appeal is taken was entered on January 7th, 1941. On January 21st, 1941, the petitioners filed a motion for rehearing. On March 11th, 1941, the Supreme Court of the State of Wisconsin denied said mo-

tion for rehearing without opinion. On June 2nd, 1941, the appellants filed with the Wisconsin Supreme Court a petition for appeal accompanied by an assignment of errors and the within "Statement as to Jurisdiction". On June 2nd, 1941, the Honorable Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin, made and entered an Order allowing the within petition to the Supreme Court of the United States.

5) CONSTITUTIONAL QUESTION—TIMELY AND SUFFICIENTLY RAISED.

The claim that the Wisconsin Employment Peace Act is repugnant to the Constitution and laws of the United States was consistently and frequently raised throughout the entire proceedings herein before the Wisconsin Employment Relations Board in the form of "Objection of Allen-Bradley Union to Jurisdiction of the Wisconsin Employment Relations Board and Motion to Dismiss Complaint" (C. 83, R. 150). This objection and motion was dismissed by the State Board.

The same objection and motion was renewed orally at the outset of the proceedings before the State Board (C. 88, R. 163).

Upon the issuance of the final order by the State Board, the appellants filed a petition for review of its final order and set forth therein, as the major ground for said review, the claim that the State Act was repugnant to the provisions of the National Labor Relations Act, and was therefore void and unconstitutional. The said petition for review set forth in detail the various ways in which the State Act was in conflict with the National Labor Relations Act (C. 2-19, R. 4-19), on its face and as construed and applied to the appellants.

The same claim was made again in the reply of the appellants to the cross petition of the State Board for enforcement of its final order (C. 33-49, 41-55).

The Circuit Court, after expressly considering these constitutional objections, rejected them and upheld the constitutionality of the State Act on its face and as construed and applied to the appellants. Upon appeal to the Wisconsin Supreme Court, the appellants in their brief again set forth the same claims. The Wisconsin Supreme Court denied each of the contentions of the appellants. The motion for rehearing filed after the Wisconsin Supreme Court rendered its decision, set forth once again the claim that the State Act on its face and as construed and applied to the appellants was repugnant to the Constitution and laws of the United States in divers ways.

6) NATURE OF THE CASE.

The Allen-Bradley Company is a manufacturer in the City of Milwaukee engaged in producing electrical control equipment. It employs approximately 700 workers. The character of its business is such that it is engaged in interstate commerce and subject to the National Labor Relations Act. The Company at the hearing before the State Board stipulated that it was subject to the National Labor Relations Act (C. 89, R. 164).

On May 6th, 1939, the Appellant Union called a strike at the plant of the Company. The Company filed a complaint with the State Board against the Union and its members, charging them with violating Sections 111.06, Subsection (2), Subsection (3) of the State Act. On February 1st, 1940, the State Board issued its final order wherein it found that the fourteen individual appellants and the Union had committed acts of misconduct in violation of Sections 110.06 (2) (a) (e) (f) and (j) of the State Act, and, as a conclusion of law, ruled that each of the fourteen individual appellants and the Union were guilty of unfair labor practices.

The acts of misconduct of the fourteen individual appellants are set forth in the findings of fact and are unchallenged.

These findings are set forth in the final Order as follows:

"11. That Fred Wolters was, prior to the time of the strike, an employee of the Allen-Bradley Company, and president of the Union, and that by threats, force and coercion of other kinds, he attempted to intimidate and to prevent certain employees of the company who desired to continue their employment therein, from pursuing their lawful work and employment.

12. That Esther Kuzmerck, Esther Greenmeier, Sophie Kozcierski, Frances Chandek and Agnes Tanko, were prior to the time of the strike, employees of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent Ruth Batt, an employee of the Allen-Bradley Company, who desired to continue her employment therein, from pursuing such lawful work and employment, and that the said named persons committed an assault and battery upon the person of said Ruth Batt.

13. That Harry Rose and Dan Roknich were, prior to the time of the strike, employees of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent one Marie Rudella, an employee of the Allen-Bradley Company, who desired to continue her employment therein, from pursuing her lawful work and employment.

14. That Tony Calabreesa and Edward O'Kulski were, prior to the time of the strike, employees of the Allen-Bradley Company, and that by assault, force and coercion, attempted to prevent one Ann Cycosch, who desired to continue her employment with the Allen-Bradley Company, from pursuing her lawful work and employment.

15. That Peter Blazek, prior to the time of the strike an employee of the Allen-Bradley Company, assaulted one Anton Stanwick, an employee of the Allen-Bradley

Company, and by such assault attempted to intimidate said Anton Stanwick and to prevent him from continuing his employment with the Allen-Bradley Company.

16. That Eilif Tompte and Edward Larson, prior to the time of the strike, employees of the Allen-Bradley Company, were arrested and convicted of attempting to damage property belonging to employees of the Allen-Bradley Company, who continued to work for said company during the strike, and that such misdemeanor was committed in connection with the controversy then existing between the company and the Union.

17. That Mike Dembski, prior to the time of the strike an employee of the Allen-Bradley Company, was arrested on the picket line maintained by the Union, armed with concrete rocks, and that said Dembski intended to use such rocks for the purpose of intimidating employees of the company who desired to continue their employment therein, from pursuing such lawful work and employment."

The Board also found that the Union had engaged in the following acts:

"5. That from the beginning of said strike, the Union has engaged in mass picketing at all of the entrances to the factory for the purpose of hindering and preventing the pursuit of lawful work and employment by employees of the Allen-Bradley Company who desired to engage in such lawful work or employment.

6. That after the commencement of said strike, the Union obstructed and interfered with entrance to and egress from the factory of the company, and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory of the company.

7. That the Union, by its officers and many of its members, threatened bodily injury and property damage to many of the employees desiring to continue their employment with the company.

8. That the Union required of persons desiring to enter the factory without interference that they obtain passes from the Union at its strike headquarters.

9. That the Union, by its officers and many of its members, picketed the domiciles of many employees desiring to continue their employment with the company."

On the basis of these findings, the Board ruled that the individual appellants were guilty of unfair labor practices (C. 24, R. 25) and directed the Union and its members to cease and desist from "mass picketing", "threatening employees", "obstructing entrances", "obstructing full use of streets", and "picketing domicile of any employee".

The final Order of the State Board was upheld in full without any modifications by the Wisconsin Supreme Court.

Under Section 111.02 (3) (b) of the State Act, set forth above, striking employees, who are found guilty of unfair labor practices, automatically lost their status as employees for the purposes of the State Act.

Accordingly these individuals, and the Union through which they exercise their rights to collective bargaining, are no longer entitled to the rights of "employees" set forth in Section 111.04 of the State Act. This is the section of the State Act corresponding to Section 7 of the National Labor Relations Act.

They are no longer entitled to the benefits of Section 111.05 of the State Act which provides for the free choice of collective bargaining representatives by "employees". This is the section of the State Act corresponding to Section 9 of the Federal Act.

They are no longer protected from the invasion of the rights of "employees" under Section 111.04 by the unfair labor practices of employers set forth in Section 111.06 (1) (a)—(k), inclusive, of the State Act. This is the section of the State Act corresponding to Section 8 of the Federal Act.

Under the principals of the National Labor Relations Act, the individual appellants retain their status as employees for all of the purposes of collective bargaining.

Thus in this case, the entire scheme of the Wisconsin Employment Peace Act as a system of regulations of collective bargaining comes squarely into conflict with the system of regulations of collective bargaining established by valid Federal law.

7) THE FEDERAL QUESTION INVOLVED IS SUBSTANTIAL.

The question in this case is whether the State of Wisconsin may enforce a statute purporting to regulate collective bargaining relationships affecting interstate commerce, which in its terms and provisions, on its face, and as construed and applied in this case, is in conflict with and repugnant to the National Labor Relations Act.

The applicable principles of law which demonstrates that there is a substantial Federal question involved in this case are clear and well-established.

1) The National Labor Relations Act is a valid exercise of the constitutional power of Congress to regulate commerce between the States. *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1; *Phelps-Dodge Corp. v. N. L. R. B.*, 61 Sup. Ct. 845.

2) The basic purposes of the National Labor Relations Act are to protect the fundamental rights of employees to self organization, to collective bargaining and to other concerted action for their mutual aid and protection against discrimination and interference by the employer. *N. L. R. B. v. Jones & Laughlin*, *supra*; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *Phelps-Dodge Corp. v. N. L. R. B.* *supra*; *Mackay Radio & Tel. Co. v. N. L. R. B.*, 304 U. S. 333.

3) Under the National Labor Relations Act, employees who may commit unlawful acts of minor disorders in the course of a strike cannot be deprived of their fundamental rights as employees and of the statutory protection afforded to these rights by the Federal Act. *Republic Steel Corp. v. N. L. R. B.*, 107 F. (2d) 472, cert. den. 309 U. S. 684, affg. 9 N. L. R. B. 219, except for modifications in other respects, 61 Sup. Ct. 77; *N. L. R. B. v. Stackpole Carbon Co.*, 105 F. (2d) 167, cert. den. 308 U. S. 605; *Southern Steamship Corp. v. N. L. R. B.*, 3d Circ. decided May 6, 1941, 8 Labor Relations Reporter 394; *Carlisle Lumber Co. v. N. L. R. B.*, 99 F. (2d) 533.

The rule and its justification was succinctly stated in the opinion in the Republic Steel case, where the Court said: (107 F. (2d) at p. —).

“In the Fansteel case the Court was dealing with a case which involved a sit-down strike in which the strikers forcibly and unlawfully deprived their employer of possession of his plant. The Court made it clear that unlawful conduct of that character deprived the participant of the right of reinstatement. We think it must be conceded, however, that some disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory. We accordingly recently held that it was not intended by the Act that minor dis-

orders of this nature should deprive a striker of the possibility of reinstatement. *National Labor Relations Board v. Stackpole Carbon Co.*, *supra*."

4) It has long been settled that where there is a conflict between a statute enacted by Congress pursuant to its delegated powers, as for example, the regulation of interstate commerce, and a law adopted by a State in the exercise of its police power, then the Federal statute must prevail. *Gibbons v. Ogden*, 9 Wheat. 7; *Southern Railway Co. v. Reid*, 222 U. S. 424; *Consolidated Edison Co. v. N. Y. R. B.*, 305 U. S. 197, 222-224; *Hines v. Davidowitz*, 61 Sup. Ct. 399; *Reuping Leather Co. v. Wisconsin Labor Relations Board*, 228 Wisc. 415, — N. W. —; *Davega City Radio Inc. v. New York Labor Relations Board*, 281 N. Y. 13, 22 N. E. (2d) 145.

In the *Consolidated Edison Company* case this Court said, speaking of the New York State Labor Relations Act:

"It is manifest that the enactment of this State law could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority."

That there is a conflict between the Wisconsin Labor Relations Act and the National Labor Relations Act is evident from the summary of the case recited above. The Wisconsin Act on its face purports to override the labor policy of the Federal government, and to detract therefrom. Section 110.02 (3) (b) of the Wisconsin Act provides that a striking employee who commits unlawful acts of minor disorder loses his position as an employee and thereby is denied the protection of the Wisconsin Act and the employer is free to discharge him for union affiliations or activities. The authority of the State of Wisconsin has thus been exercised to authorize and permit the very thing which Congress in the exercise of its constitutional powers, has prohibited as contrary to the public policy of the United States.

As construed and applied to the individual appellants and their union co-appellant, the Wisconsin Act, through the final order of the Wisconsin Board, upheld in full by the Wisconsin Supreme Court, denies the strikers of their status as employees for such purposes and authorizes and permits their employer to discriminate with impunity against them on account of their union affiliations and activity.

The appellants contend:

a) That the Federal Congress has pre-empted the field covered by the National Labor Relations Act and the Wisconsin Act, purporting to deal with precise subject matters of the Federal Act, is altogether void and of no effect.

b) That, even if the State of Wisconsin had the power to enact a labor relations act dealing with the same subject matter as the Federal Act, then the Wisconsin Act on its face and as construed and applied to the appellant, is so inconsistent with the Federal Act, that the two acts cannot stand together, and the State Act must be deemed altogether void and of no effect.

This is not a case where the State Act merely prohibits and punishes unlawful acts against the peace and order of the State committed by individuals in the course of a labor dispute. There is no issue as to the existence of such powers in the State. But the appellants submit that this is a case where the State is seeking to do more than prohibit such unlawful acts. The Wisconsin Employment Peace Act is a regulation of collective bargaining and labor relations, as fully as is the National Labor Relations Act. Under this State statute, Wisconsin has authorized the very things which Congress has prohibited.

The appellants respectfully submit that there is a substantial Federal question involved herein: This Court must

determine whether, under the circumstances of this particular case, the Wisconsin Employment Peace Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress expressed in the National Labor Relations Act.

Conclusion.

WHEREFORE, it is respectfully submitted that the appellants in the above-entitled cause, come properly within the jurisdiction of this Court.

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Attorneys for Appellants.

Of Counsel:

MAX E. GELINE.

EXHIBIT "A".**Opinion of the Circuit Court of Milwaukee County, State of Wisconsin, Dated December 14th, 1939, Affirming and Enforcing the Interlocutory Order of the Wisconsin Employment Relations Board.**

This is an action commenced on July 27, 1939, under Chapter 57, Laws of 1939 (known as the Employment Peace Act), by petitioner, Wisconsin Employment Relations Board against Allen-Bradley Local 1111, Wisconsin Electrical & Radio Workers of America, respondent, for the purpose of enforcing an order of the plaintiff Board.

Hearings were duly had in July, 1939, and the Board on July 13, 1939, made and filed certain interlocutory findings of fact, conclusions of law and the following order:

"1. Cease and desist from:

- a. Engaging in mass picketing at or near the plant of the Company and particularly shall refrain from such picketing on the street surrounding said plant, to-wit: Greenfield Avenue, Madison Street, South First Street, and South Second Street;
- b. Threatening employees of the Company with physical injury, property damage, or otherwise;
- c. Obstructing and interfering with the entrance to and egress from the factory of the Company;
- d. Obstructing and interfering with the free and uninterrupted use of the streets and public roads and sidewalks surrounding the factory of the Company;
- e. Picketing the domicile of any employee of the Company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

- a. The Union may maintain a picket line at or near the premises of the Company, but shall not allow more than fifteen (15) persons to be on such picket line at any one

time of the day. Of such fifteen persons, not more than six (6) shall be on any one of the streets surrounding the plant of the Company at any one time. The pickets are not to obstruct or in any way interfere with entrance to or egress from the plant of the Company. They are not to obstruct or interfere with the free and uninterrupted use of the streets, sidewalks or public roads surrounding the factory of the Company. They are not to in any manner threaten employees or customers of the Company. They are not to endeavor to prevent any one from entering the factory of the Company, and they are not to jeer at, revile, or call any one entering the plant vulgar or offensive names. Such pickets are to be maintained solely for the purpose of notifying the public, employees and prospective employees, that a strike is in progress, and are limited to a number sufficient, in our opinion, to let a reasonable person know that such strike is in progress.

b. Post immediately notices to their members in conspicuous places at the Union strike headquarters, the Union meeting hall, and on each street corner around the Company's factory stating:

1. That the Union will cease and desist in the manner aforesaid;

2. That all picketing is to be carried on as aforesaid;

3. That such notices remain posted for a period of at least thirty (30) days from the date of posting.

e. Notify the Board in writing within ten (10) days from the date of the receipt of this Order what steps the Union has taken to comply therewith."

Several days before this action for the enforcement of the Board's order came on for hearing in this court the strike was terminated. An answer was thereupon filed on behalf of the respondent alleging that the strike had been terminated. It is therefore contended that the controversy had become moot by reason of the cessation of the strike and that, therefore, the prayer of the petition should be denied.

No serious challenge is made by respondent to the findings upon the ground that there is no evidence to support them. The findings of the Board must, therefore, be deemed to be conclusive upon this Court. Section 111.07 (7) provides that:

"Findings of Fact made by the Board if supported by credible and competent evidence in the record, shall be conclusive."

The general doctrine applied to cases involving private litigants that a settlement renders the controversy moot does not apply to cases involving lawful orders of public administrative boards. The decision of the United States Supreme Court in *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, is adverse to respondent's contention upon that point. This case involved an order of the National Labor Relations Board ordering an employer to cease and desist from recognizing a company union as a bargaining agent for employees. At the trial it was claimed on behalf of the employer that the controversy had been rendered moot by its withdrawing recognition from the union and certifying a non-company union as the bargaining agent. In declaring the controversy had not been rendered moot, the Court said:

"Respondents suggest that the case has become moot by reason of the fact that since the Board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania Company for purposes of collective bargaining and that in a pending proceeding under section 9 (c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania Company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

The same doctrine was recognized in *N. L. R. B. v. Pure Oil Company* (C. C. A. 5th, 1939), 103 Fed. (2d) 497. The Court said:

"We do not think the controversy with which the order deals has become moot. The respondent is required to desist from dominating the Refinery Workers' Union of the Smith's Bluff Refinery, or any other labor organization of its employees. While it is true that the Smith's Bluff Refinery has been disbanded; it may be reorganized, or a similar organization formed under another name, with the same employees. The act does not permit an evasion of this kind, and the order under consideration is formed and phrased to prevent it. If it be conceded that respondent has taken the affirmative action required of it, there are certain desist-provisions of the order which operate entirely prospectively."

Respondent relies upon the case of *Leader v. Apex Hosiery Company*, 302 U. S. 656. The controversy there involved was regarded by the Court as a private controversy and did not involve the lawful order of a public administrative board and can readily be distinguished upon that ground. By the weight of authority it must be held that in the situation here presented the controversy did not become moot by the cessation of the strike. Other cases supporting that conclusion are:

N. L. R. B. v. Oregon Worsted Co., 96 Fed. (2d) 193 (1938);

Consolidated Edison Co. v. N. L. R. B., U. S. —, 83 L. ed. 131, 141, decided December 5, 1938;

Fed. Trade Comm. v. Goodyear Tire & Rubber Co., 304 U. S. 254;

U. S. v. Freight Assn., 166 U. S. 290;

Southern Pacific Co. v. Int. Commerce Comm., 219 U. S. 498;

Sears Roebuck Co. v. Federal Trade Comm., 258 Fed. 307, 6 A. L. R. 658.

It appears to be well settled by the weight of authority that where the controversy involves the lawful order of an

administrative board, it does not become moot under circumstances similar to those disclosed in this case. It must be held, therefore, that the controversy was not rendered moot by the termination of the strike before the hearing upon the petition for the enforcement of the order of the Board.

Section 111.06 defines unfair labor practices on the part of the employer, individually or in concert with others.

Section 111.06 (2) defines unfair labor practices on the part of the employee:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

It is contended by respondent that this provision of the statutes is unconstitutional upon the ground that Congress, by the adoption of the National Labor Relations Act, has pre-empted the field and has thereby deprived the state of its power to legislate on the subject of employer and employee relationship, and upon the further ground that the section of the statutes just referred to is violative of provisions of the United States and the State Constitutions, and that, therefore, the specific order of the Board relating to mass picketing must be held to be invalid.

In approaching the discussion of the constitutionality and the statute and the order of the Board, it must be clearly recognized and borne in mind that a statute should not be declared to be unconstitutional unless it clearly appears to be so beyond reasonable doubt. This rule is well stated in Volume II, American Jurisprudence, p. 718.

"The courts invariably give the most careful consideration to questions involving the interpretation and application of the Constitution and approach constitutional questions with great deliberation, exercising their power in this

respect with the greatest possible caution and even reluctance; and they should never declare a statute void unless its invalidity, is in their judgment, beyond reasonable doubt.

In all instances where the court exercises its power to invalidate, the conflict of the statute with the Constitution must be irreconcilable, * * * ; to doubt the constitutionality of a law is to resolve the doubt in favor of its validity. (p. 766; et seq.) The general principle has been expressed in many different forms. It has been declared that in no doubtful case should the courts pronounce legislation to be contrary to the Constitution; that to doubt the constitutionality of a law is to resolve all or every doubt in favor of its validity; * * * and that the court will resolve every reasonable doubt in favor of the validity of the enactment. It has been said that every intendment is in favor of its validity, that it must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears or is made to appear beyond a reasonable doubt; and that it is only where its invalidity is made to appear clearly, plainly, palpably and by irrefragable evidence, where the case is so clear as to be free from doubt, or the act is manifestly in contravention of the Constitution, and where all in all invalidity is disclosed in such a manner as to leave no reasonable doubt, that the courts will declare it unconstitutional. Every reasonable and rational presumption must first be indulged in favor of the validity of the act."

Our Supreme Court has recognized and declared this rule in many cases.

Ry. Co. v. State, 128 Wis. 553;
 Re: Appointment of Revisor, 141 Wis. 592;
 State v. Frear, 142 Wis. 320;
 State v. Daniels, 143 Wis. 649;
 State v. Phelps, 144 Wis. 1;
 Borgnes v. Falk Co., 147 Wis. 327;
 Peterson v. Widule, 157 Wis. 641;
 State v. Donald, 164 Wis. 545;
 Outagamie Co. v. Zuelke, 175 Wis. 253;
 State v. Emery, 178 Wis. 147;
 Dick v. Heisler, 184 Wis. 77;
 N. W. L. Ins. Co. v. State, 189 Wis. 103;

State v. Zimmerman, 191 Wis. 10;
State v. Langlade County Creamery Co., 193 Wis. 113;
Cliffs Chem. Co. v. Wis. Tax Comm., 193 Wis. 295;
Malionowski v. Moss, 196 Wis. 292;
State v. Diehl, 198 Wis. 326;
State v. Dammann, 209 Wis. 21;
Payne v. Racine, 217 Wis. 550;
 In re: *Estate of Nieman*, 230 Wis. 23.

It is claimed that the Wisconsin Act is void and unconstitutional because it attempts to regulate the same subject which is covered by the National Act. The same question was raised and most carefully considered by our Supreme Court in *Wisconsin Labor Relations Board v. Reuping Leather Company*, 228 Wis. 473. The Reuping Leather Company contested the authority of the Wisconsin Board to proceed under the Wisconsin Act on the ground that the Federal Board had sole jurisdiction. In that case the employer insisted that the Wisconsin Labor Relations Act was invalid because Congress had pre-empted the entire field by the passage of the National Labor Relations Act. Our Supreme Court in a very carefully considered opinion by Mr. Justice Wickham held otherwise. The Court said:

"The power of the State of Wisconsin to subject labor relations to regulation is based upon the police power; that of the federal government to deal with the same subject is grounded upon and limited by the commerce clause, and is sustained upon the theory that strikes, boycotts, and other disturbances arising from labor disputes in industries engaged in interstate commerce so proximately obstruct and burden interstate commerce as to bring labor relations in such industries within the power of Congress.

"The state may, therefore, regulate labor relations in the interests of the peace, health, and order of the state, and the federal government may regulate this relationship to the extent that unregulated it tends to obstruct or burden interstate commerce. Obviously, a possibility of conflict between these powers exists only as to the portion of the field with which Congress has competency to deal. In the absence of a federal statute either dealing with or pre-

empting this field, the police power of the state has full operation, provided no undue or discriminatory burdens are put upon interstate commerce."

The Court further said:

"The National Act does not purport to exclude states from the regulation of the field of labor relations.

"Moreover, the regulation of labor relations as contemplated by the new National Act constitutes only one very small segment of employer-employee relations."

It is clearly pointed out in the *Reuping* case that the similarity or conflict between the national and the state laws is not the determining factor. But, that the conflict in actual administration must be held to be controlling. It is not the possibility of conflict, but the actual conflict in administration that is of vital importance, and when such conflict is presented "It will be time enough to attack the problems they present."

It is earnestly contended by respondent that the provision as to mass picketing contained in Section 111.06 (2) (f) is invalid because violative of the constitutional guaranty of free speech and the denial of the right of peaceable assemblage and the equal protection guaranty and that it is unreasonable because it establishes no standard of guilt. The same contention is urged with respect to the provisions of Section 111.06 (2) (a) declaring it is unfair labor practice "for an employee, individually or in concert with others" to picket the domicile of an employee or his family.

As has already been pointed out, section 111.06 (2) (f) is not intended to declare all mass picketing to be unlawful, but it is expressly limited in its application to cases tending "to hinder or prevent . . . the pursuit of any lawful work or employment."

Findings of petitioner contain the general statement that mass picketing under all circumstances is unlawful and cite in support of this general statement "The Government in Labor Disputes", Witte. But a careful reading of the case shows that this statement of the rule should be interpreted to mean that such mass picketing becomes unlawful

when carried out by force or coercion or other unlawful acts. A statement in "Labor and the Government" (Twentieth Century Fund), page 335, may be taken as a fair statement of the more recent decisions on the subject:

"Court decisions on picketing have been confused and contradictory. It is generally conceded that peaceful picketing should be permitted. But when 'peaceful picketing' in a dispute which involves many thousands of workers in a large plant, is interpreted to mean the presence of no more than one or even two or three pickets at each plant entrance, it is obvious that the effectiveness of picketing is seriously limited. Mass picketing, conducted in accordance with the laws forbidding violence, is the only way to reach any considerable proportion of the workers. And unless it is premised that the workers have no right to strike, it follows that they have also the right to make representations to fellow workers still employed or to strike breakers, which shall be not only orderly and lawful, but which shall stand some chance of making out an effective case for the strike."

This statement, in my opinion, is a fair and reasonable statement of the general trend of the decisions. There is a clear and unmistakable tendency to veer away from or greatly broaden the rule laid down by the case of *American Steel Foundries v. Tri-City Trade Council*, 257 U. S. 184. A fair reading and interpretation of the statute involved, seems to me, is in accord with this doctrine. The end sought to be accomplished is prevention and avoidance of unlawful means and the application of force and coercion. A perusal of the dissenting opinion of Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U. S. 312, 42 Supt. Ct. 124, 66 L. ed. 254, 27 A. L. R. 75, 382, 383, clearly shows that section 111.06 (2) (a) (f) is not violative of any right guaranteed by the federal or state constitution. It is concluded that section 111.06 (2) (a) (f) is a valid and constitutional enactment. Other cases upholding the right of legislatures to enact such statutes are:

American Steel Foundries v. Tri-City C. T. Council,
257 U. S. 184, 42 Sup. Ct. 72, 661 L. Ed. 179, 27
A. L. R. 360;

Exchange Bakery & Restaurant v. Rifkin, 157 N. E. (N. Y.) 130, 133;

Levy v. International etc. Union, 158 Atl. (Conn.) 795;

International Ticket Co. v. Wendrich, 193 Atl. (N. J.) 808;

Keuffel & Esser v. International Assn. of Machinists, 166 Atl. (N. J.) 9, 10-11;

United Chain Theatres v. Philadelphia etc. Union, 50 Fed. (2d) (Pa.) 189, 192;

Goldfinger v. Feintuch, 11 N. E. (2d) (N. Y.) 910.

Whether this Court, if the matter were presented as an original proposition, would as severely limited the number of pickets at the places of ingress and egress as was done by the order is immaterial to a determination of the matter before this court and is therefore not to be considered. By virtue of section 111.07 (f) (7) "the findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive." This Court, therefore, has no discretion in the matter with respect to the matter of the limitation of the number of pickets, but must enforce the order of the Board as required by the statute where there is credible evidence to support the finding.

In *Seen v. Tile Layers Protective Union*, 301 U. S. 468, at 478, Justice Brandeis reiterates the doctrine by him discussed in the dissenting opinion in *Truax v. Corrigan*. He said:

"The Court may, in the exercise of its power, regulate the methods and means of publicity as well as the use of public streets."

It must, of course, be made to appear that the purpose of the state statutes is sufficient to justify the restriction. It is never justified where the purpose is trivial. This was clearly pointed out by Justice Roberts in the opinion of the Court in the very recent case of *Snyder v. City of Milwaukee* (U. S. Sup. Ct., November 22, 1939). It must be held that the legislative purpose declaring the Employment Peace Act is sufficient to warrant the restriction imposed by sec-

tion 111.07 (a) (2) and (f): It is concluded that the order made on the 13th day of July, 1939, is a valid order.

The order made on the 13th day of July, 1939, must be confirmed.

Dated December 14, 1939.

Otto H. Breidenbach, Circuit Judge.

EXHIBIT "B".

Opinion of Circuit Court of Milwaukee County, Wisconsin, Dated July 16th, 1940, Enforcing the Final Order of the Wisconsin Employment Relations Board.

Petition of Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, and fourteen individuals, named petitioners, to review the final order of the Wisconsin Employment Relations Board, dated February 1, 1940, in proceedings entitled, "Allen-Bradley Company, complainant, against Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, respondent. The Board and respondent, Allen-Bradley Company, have interposed answers to such petition and the Board presents its cross petition for judgment confirming its final order and for its enforcement.

On July 13, 1939, the Board issued an interlocutory order in the proceedings herein involved, and on January 4, 1940, judgment confirming such interlocutory order was entered by this Court. No material differences are discernible in the orders (interlocutory and final) except that the final order names the individual members (herein named as petitioners) and finds that they have been guilty of unfair labor practices. This additional provision of the final order, it is claimed by petitioners, in effect terminates the employee status of such named members and that it is, therefore, in conflict with and repugnant to the National Labor Relations Act, Section 2 (3). The National Labor Relations Act, it is claimed, guarantees the continuance of the employee status and that any provision in any way restricting or curtailing such provision must be held to be in conflict therewith and therefore invalid and unconstitutional.

The provisions of the National Labor Relations Act referred to must be held, in the light of the decisions interpreting the act, to continue the employee status for the purpose of effectuating the clear intent of the act, which is to prevent unfair labor practices on the part of the employer from interfering with the protection afforded the employee under the act. In other words, unless the employee status is preserved, the purpose of the act may be defeated. The accomplishment of the same purpose was evidently sought by the enactment of the following portion of Section 111.02 (3) R. S., which reads as follows:

"The term 'employee' shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practices on the part of an employer."

The portion of this section particularly complained of by petitioners herein is as follows, in defining the term "employee", among other things, this language is used:

"(b) Who has not been found to have committed or been a party to any unfair labor practice."

The intent of the National Labor Relations Act with respect to preserving the employee status and the limitation as to its scope implicit therein are set forth in *N. L. R. B. v. Fansteel Corp.*, 306 U. S. 240; *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347; *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, 45, 46; *The Public Steel Corp. v. N. L. R. B.*, 107 Fed. (2d) 472; *N. L. R. B. v. Stackpole Carbon Co.*, 105 Fed. (2d) 167.

It is clear intent of the National Labor Relations Act to preserve the employ status wherever necessary to effectuate the purposes of the act and for that purpose only.

Furthermore the situation here presented by petition does not involve a case of employer unfair labor practices under the findings of the Board which must be held to be conclusive, as heretofore indicated by the decision in the interlocutory order, so that an actual case of conflict is not presented in any event. As was stated in *W. L. R. V. v. Fred Reuping Leather Co.*, 228 Wis. 473, the time to re-

solve the question of the conflict in the administration of the two acts will be when such situation of conflict is presented.

My conclusion is that no case of conflict between the National and State Acts is presented and that Section 111.02 (b), Wisconsin Statutes must be held a valid enactment.

For the reasons already set forth in the decision of the court affirming the interlocutory order and for the further reasons herein stated, the final order of the Wisconsin Employment Relations Board must be confirmed.

Dated July 16, 1940.

Otto H. Breidenbach, Circuit Judge.

EXHIBIT "C".

Opinion of the Supreme Court of the State of Wisconsin.

IN SUPREME COURT, STATE OF WISCONSIN.

August Cal.—1940. January Term—1941.

No. 213.

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, et al., Appellants,

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD et al.,
Respondents.**

Appeal from a Judgment of the Circuit Court for Milwaukee County: Otto H. Breidenbach, Circuit Judge. Affirmed.

Labor relations. This action was begun on March 14, 1940, by Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, Fred Wolter, Esther Kusmierz, Esther Greenemeier, Sophie Kosciarski, Frances Chandek, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabresa, Edward Okulski, Peter Blazek, Eilif Tomte, Edward Larson and Mike Domeski, plaintiffs,

against Wisconsin Employment Relations Board and Allen-Bradley Company, a Wisconsin corporation, defendants, to review an order of the Wisconsin Employment Relations Board, dated February 1, 1940, the Allen-Bradley Company employer. The Wisconsin Employment Relations Board, hereinafter referred to as the Board, answered the petition and filed a cross-petition praying that the order sought to be reviewed should be enforced as provided by law. The Allen-Bradley Company answered the petition and concurred in the prayer that the order sought to be set aside should be enforced. There was a trial and judgment of the circuit court was entered on September 3, 1940, from which the plaintiffs appeal.

The Allen-Bradley Company is engaged in the business of manufacturing in the City of Milwaukee and it was stipulated by the parties that the Company is subject to the National Labor Relations Act. The Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, is a labor organization composed of the employees of the Allen-Bradley Company working in the city of Milwaukee.

Prior to the 1st day of May, 1939, there had been in force a contract between the company and the Union governing the terms and conditions of employment which contract was cancelled by the Union, cancellation to take effect as of the 30th day of April, 1939. On May 10, 1939, the Union by a secret ballot ordered a strike, pursuant to which a strike was called by the Union. After the strike was called on May 11, 1939, the Company continued to operate its plant for the duration of the strike which lasted about three months. Differences arose between the striking employees and the Company and those who continued to serve it. The Company thereupon filed a petition with the Board on July 27, 1939, charging the Union and certain of its officers and members with unfair labor practices. Notice of hearing was served which hearing was to be held on June 19, 1939. The Union answered, objecting to the jurisdiction of the Board, claiming that the matters in controversy were solely and exclusively within the jurisdiction of the National Labor Relations Board. It was then answered generally reserving its objection to the jurisdiction. Hearing was

had before the Board in which testimony was taken, and on the first day of February, 1940, the Board made its final order. The findings of fact made by the Board upon which its final order is based are not attacked on this appeal. Briefly, from the findings the following facts appear:

(a) Appellants engaged in mass picketing at all entrances to the premises of the Company for the purpose of hindering and preventing the pursuit of lawful work and employment by employees who desired to work.

(b) They obstructed and interfered with the entrance to and egress from the factory and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory.

(c) They threatened bodily injury and property damage to many of the employees who desired to continue their employment.

(d) They required of persons desiring to enter the factory, to first obtain passes from the Union. Persons holding such passes were admitted without interference.

(e) They picketed the homes of employees who continued in the employment of the company.

(f) That the Union by its officers and many of its members injured the persons and property of employees who desired to continue their employment.

(g) That the fourteen individual appellants who were striking employees, had engaged in various acts of misconduct. The facts relating to those were found specifically. The acts consisted of intimidating and preventing employees from pursuing their work by threats, coercion, and assault; by damaging property of employees who continued to work; and as to one of them by carrying concrete rocks which he intended to use to intimidate employees who desired to work.

Based upon these findings the Board found as conclusions of law, that the Union was guilty of unfair labor practices in the following respects:

(a) Mass picketing for the purpose of hindering and preventing the pursuit of lawful work.

(b) Threatening employees desiring to work with bodily injury and injury to their property.

(c) Obstructing and interfering with entrance to and egress from the factory.

(d) Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory.

(e) Picketing the homes of employees.

As to the fourteen individual appellants, the Board concluded that each of them was guilty of unfair labor practices by reason of threats, assaults and other misdemeanors committed by them as set out in the findings of fact.

Based upon its findings of fact and conclusions of law the Board ordered that the Union, its officers, agents and members

(1) Cease and desist from:

(a) Mass picketing.

(b) Threatening employees.

(c) Obstructing or interfering with the factory entrances.

(d) Obstructing or interfering with the free use of public streets, roads and sidewalks.

(e) Picketing the domiciles of employees.

The order required the union to post notices at its headquarters that it had ceased and desisted in the manner aforesaid and to notify the Board in writing of steps taken to comply with the order.

As to the fourteen individual appellants, the order made no determination based upon the finding that they were individually guilty of unfair labor practices.

As already stated, the controversy was brought before the circuit court on a petition to review. After hearing and argument in the circuit court, judgment was entered September 3, 1940, sustaining confirming and enforcing the order of the Board, from which judgment plaintiffs appeal.

ROSENBERY, C. J.:

Upon this appeal no question is raised as to the constitutionality of the Wisconsin Labor Relations Act, pursuant to which the proceeding under consideration was had, except that it is in conflict with the National Labor Relations Act. Stated in the language of the brief, the appellants contend

"That the Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce."

Appellants further contend that the finding of the Board that the fourteen strikers were guilty of unfair labor practices, is unconstitutional because it is so in conflict with regulations of that National Act governing the employe status of the fourteen strikers that the employe sections of the two acts cannot consistently stand together. While appellant uses the term "unconstitutional", their argument is that the state law can have no application to a manufacturer subject to the National Labor Relations Act because the jurisdiction of the National Labor Relations Act has preempted the field of labor relations in cases where the employer is carrying on an industry in interstate commerce.

We enter upon an examination of the contentions of the plaintiffs and the arguments made in support thereof fully aware that we are dealing with one of the most difficult as well as delicate questions presented to the courts of this country, to-wit: the delimitation of the power of the state and the federal government over a matter which is subject to some extent to their concurrent jurisdiction. The line of demarcation between the federal and state power is not a straight line. It is not only irregular but it is subject to change. The extent of state jurisdiction in some fields depends upon whether the field has been occupied by federal authority. Areas not thought to be within the scope of

federal power originally may be brought within it by economic and social changes. Neither the state nor the federal constitutions change but the subject matter to which they are applied changes and so a new and different result is reached by the application of constitutional principles. See *Home Bldg. & Loan Assn. v. Blaisdell* (1933), 290 U. S. 398, 88 A. L. R. 1519. Note, Government powers in peace-time emergencies.

Yet "the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *Labor Board v. Jones & Laughlin* (1936), 301 U. S. 1, 30.

We shall first consider the purpose and scope of the National Labor Relations Act for the reason that wherever it applies, it excludes state action from the occupied field. Upon this proposition there is no disagreement. We shall also endeavor to determine when and under what circumstances it applies in a particular case.

While appellants recognize the fact that the National Labor Relations Act was enacted to remove burdens and prevent obstruction to the free flow of interstate commerce, they continually assert that the act confers substantive rights upon individual workers and the unions into which they are organized. Upon the basis of this proposition they argue that if there is any difference in the provisions of the two acts as to what are unfair labor practices or the remedies which may be applied by the boards, there is a necessary and fatal repugnancy between the acts.

The Supreme Court of the United States in *Labor Board v. Jones & Laughlin*, *supra*, speaking of interstate commerce said:

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. (p. 37)

"The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements *which the act in itself does not attempt to compel.* . . . The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and; on the other hand, the board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." (pp. 45, 46)

It is manifest from these and other declarations of the United States Supreme Court in the consideration of the provisions of the National Labor Relations Act that the federal government can proceed only so far with the regulation of labor relations as is necessary to protect interstate commerce, remove burdens from it and prevent obstructions to it. The more study one gives to the National Labor Relations Act, the more he is moved to admire the consummate skill with which it was drafted for the declared purpose of regulating and protecting interstate commerce and yet at the same time leaving the field of proper state action unrestricted so far as possible. A reading of the cases which have arisen in the course of the administration of the act, lead one to the conclusion that such defects as exist are defects of administration rather than defects in the law itself. The conduct of employees, although not denominated "unfair labor practices" by the act, is considered important in determining the character of the employers' acts by the National Labor Relations Board as well as the courts.

In the declaration of policy contained in the National Labor Relations Act, it is said:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstruc-

* Here and throughout the opinion italics are by the writer.

tions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

By the National Labor Relations Act the Board is given two principal functions: the first is defined by sec. 9, which as enacted, is headed "Representatives and elections"; the second is defined by sec. 10, which as enacted, is headed "Prevention of unfair labor practices". In Sec. 9 the Board is empowered after appropriate investigation and hearing to certify the name or names of representatives for collective bargaining of an appropriate unit of employees. By sec. 10 the Board is authorized to prevent by order, after hearing, and by a further appropriate proceeding in court, unfair labor practices as defined in sec. 8 of the act. The power of the Board to certify under sec. 9 the name or names of representatives for collective bargaining is not involved in this proceeding. It is apparent, however, from a consideration of the provisions of sec. 9 that the right to determine and certify the name or names of a person or persons who shall represent an appropriate unit of employees for the purpose of collective bargaining, is vested exclusively in the board.

In *A. F. of L. v. Labor Bld.* (1940), 308 U. S. 401, the United States Supreme Court had before it for determination the question whether a certification made by the Board pursuant to the provisions of sec. 9 was subject to review by the Circuit Court of Appeals of the proper circuit. The Court held:

"The conclusions is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in sec. 9 (d). (Upon a petition for the enforcement or review of an order under sec. 10 (c), an order made pursuant to sec. 9 (c) may be reviewed.)"

By sec. 10 (a) it is provided that

"The Board is empowered, as hereinafter provided, to prevent any persons from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive (and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.)*"

By sec. 10 (b) it is provided that whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board or any agent or agency designated by the board for such purpose, *shall have power to issue and cause to be served upon such person its complaint, stating the charges, etc.*

By sec. 10 (c), it is provided:

"If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

Under the provisions of the act, the power to forbid unfair labor practices and to require reinstatement of employees is vested exclusively in the Board and this power may not be affected by any other means of adjustment or prevention. It seems clear from these provisions that the right sought to be vindicated is the right to have interstate commerce free from burdens and obstructions. This is apparent not only from the language of the act but from the decision of the United States Supreme Court in *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940), 309 U. S. 261, 84 L. ed. 493. In that case, the union which had been a party to a labor dispute sought to have the Consolidated Edison Company and its affiliated companies adjudged in contempt for failure to comply with certain requirements of the decree made in the case to which it was a party. The Court of Appeals denied the application on the ground that "petitioner had 'no standing to press a charge of civil contempt, if contempt had been committed.'"

The Supreme Court of the United States cited excerpts from the committee reports of both houses of Congress and said:

"We think that the provisions of the National Labor Relations Act conferring exclusive power upon the board to prevent any unfair labor practice, as defined, a power not affected by any other means 'of prevention that has been or may be established by agreement, code, or law, or otherwise,' necessarily embraces exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. *It is the Board's order on behalf of the public that the court enforces.* It is the Board's right to make that order that the court sustains. *The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy.'* Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention."

The Court affirmed the decision of the Circuit Court of Appeals. See also *Fur Workers Union Local No. 72 v. Fur Workers Unions*, 105 F. (2d) 1.

It is obvious that the purpose of the National Labor Relations Act is to promote the free flow of interstate commerce by the prevention of unfair labor practices as defined in the act. The regulation of interstate commerce is the constitutional basis of the power of Congress over labor relations. Prior to the adoption of the National Labor Relations Act and the decision of the United States Supreme Court sustaining it, many persons supposed labor relations to be a subject reserved to the states by the Tenth Amendment to the Constitution of the United States and that it was beyond the competency of Congress to deal with the subject. No doubt it is because of that fact that the act so meticulously delimits the power and authority of the Labor Board to matters which substantially affect interstate commerce, that being a subject over which Congress has, when it is exercised, exclusive jurisdiction. Hence Congress does not seek in the National Labor Relations Act to deal with

labor relations generally. It deals with labor relations only so far as in its opinion it is necessary to protect interstate commerce from being impeded or obstructed by unfair labor practices on the part of employers.

The act prescribes a procedure for the protection and enforcement of the right of employees for self-organization, to bargain collectively, and to engage in collective activities as enumerated in Sec. 7 for the purpose of protecting interstate commerce and to that end it confers large discretionary power upon the National Labor Relations Board. The rights enumerated in sec. 7 were in existence before the act was passed. If the act were to be repealed these rights would still exist. No one would more promptly assert that fact than the representatives of labor.

In *Amalgamated Util. W'rk's. v. Consol. Edison Co.*, *supra*, the Supreme Court of the United States, referring to sec. 7 of the Act, said.

"Neither this provision, nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In *National Labor Relations Bd. v. Jones & L. Steel Corp.*, 301 U. S. 1, 33, 34, 81 L. ed. 893, 909, 910, 57 S. Ct. 615, 108 ALR 1352, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents'; that discrimination and coercion 'to prevent the free exercise of the right of employees to self-organization and representation' was a proper subject for condemnation by competent legislative authority. We noted that 'long ago' we had stated the reason for labor organization,—that through united action employees might have 'opportunity to deal on an equality with their employer,' referring to what we had said in *American Steel Foundries v. Tri-City Central Council*, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 A. L. R. 360. And in recognition of this right, we concluded that Congress could safeguard it in the interest of interstate commerce and seek to make appropriate collective action 'an instrument of peace rather

than of strife.' To that end Congress enacted the National Labor Relations Act."

In determining whether the Employment Peace Act is repugnant to the provisions of the National Labor Relations Act, it is of little moment whether we say that the National Act confers rights and privileges upon employees or organizations of employees, or how we describe its effect upon employees. Both from the language of the act and the construction which has been placed upon it by the United States Supreme Court, it is apparent that the act operates effectively in a particular case only in the way and to the extent which is determined by the orders of the National Labor Relations Board. If an employer indulges in any of the unfair labor practices described in sec. 8 of the act, the sole redress of the employees is to charge the employer with such unfair labor practices before the Board. When such a charge is made, the Board may or may not in its discretion decide to take jurisdiction of the controversy. Its determination will depend upon whether it finds the situation is such as to substantially affect interstate commerce. When it acts, the order of the Board determines the manner in which and the extent to which the act shall be effectively applied to the particular situation being dealt with. If the determination of the Board together with the force of public opinion is not sufficiently persuasive to bring about compliance with the Board's order, the Board may then apply to the proper circuit court of appeals for enforcement of the order. In this respect it differs materially from the transportation act of 1920, ch. 91, 41 Stat. 456. Under that act "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding." *Labor Board Case*, 261 U. S. 72, 79. See *Penna. Brotherhood v. P. R. R. Co.*, 267 U. S. 219.

The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts but is one of jurisdiction between the state and federal gov-

ernments. Inasmuch as the National Labor Relations Act depends for its effective operation upon the determination of the National Labor Relations Board, there can be no conflict between the acts until they are applied to the same labor dispute. They are upon two different planes. That National Labor Relations Act deals with labor relations only as a means of protecting interstate commerce. The Employment Peace Act deals with labor relations in the exercise of the police power of the state. To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding.

In this case the employer has never been charged with an unfair labor practice nor has the National Labor Relations Board ever been requested to determine who is the proper bargaining representative. Consequently the National Labor Relations Act has never been applied to the labor dispute here under consideration and it may never be applied, depending upon the exercise of the discretion of the National Labor Relations Board. Therefore, there can be no conflict of jurisdiction between State and Federal authority in this case. This conclusion does not depend upon the language of the two acts. If the language of the Employment Peace Act was identical with that of the National Labor Relations Act and in a particular case the National Labor Relations Board took jurisdiction, the jurisdiction of the Wisconsin Employment Labor Relations Board would be ousted notwithstanding the identity in language of the two acts and the determination made by the National Labor Relations Board would be controlling. The action of Congress leaves to the State full authority to deal with labor relations generally. Congress exercises its power in the interest of interstate commerce. With that subject the State has nothing to do. Its power to regulate—the power to promote the peace, morals, health, good

order and general welfare of the people as a whole. It may not, however, in the exercise of that power encroach upon the Federal domain.

The appellants, while asserting that they do not do so, in fact argue this case as if the failure of Congress to define unfair labor practices of employees operates as a license to employees in the enforcement of their demands to do any or all of the things declared by the Employment Peace Act to be unfair labor practices. This argument stems from the idea that Congress is regulating labor relations instead of interstate commerce. In *National Labor Relations Bd. v. Fansteel Metallurgical Corp.* (1939), 306 U. S. 240, 256, the Supreme Court of the United States said:

"Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the union committee 'to take over and hold two of the respondent's key buildings.' It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of the 'right to strike' to which the act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. *When the employees resorted to that sort of compulsion they took a position outside of the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve*

"We repeat that the fundamental policy of the act is to safeguard the rights of the self-organization and collective bargaining and thus, by the promotion of industrial peace, to remove obstructions to the free flow of commerce as defined in the act. *There is not a line in the statute to warrant the conclusions that it is any part of the policies of the act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees rights.*

It is considered that this determination by the Supreme Court of the United States disposes of the contention made.

One of the principal contentions of appellants here is that fourteen strikers who were found guilty of unfair labor practices (acts of violence and coercion) are, under the terms of the National Labor Relations Act, still employees of the Allen-Bradley Company; that because of the finding of the Wisconsin Employment Relations Board that the employees were guilty of an unfair labor practice, that relationship is severed, consequently there must be a conflict between state and federal authority. There are two answers to this contention, first, the National Labor Relations Act has never been applied to the labor dispute here under consideration; second, a mere finding of the Wisconsin Employment Relations Board does not affect the employer and employee relationship. Appellants' contention is based upon sec. 111.02 (3) of the Wisconsin Employment Peace Act. That part which is material is as follows:

"The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual . . . (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder."

Considering the language of this section by itself, it may warrant the interpretation put upon it by appellants; that is, that a mere finding is sufficient to deprive the employee of his status. However, when considered in connection with other provisions of the act, we think it cannot be so interpreted. That part of sec. 111.07 (4), which is material here, is as follows:

"Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including the

reinstatement of the employees with or without *pay*, as the Board may deem proper."

The continuation of the status of an employee is certainly a right or privilege. The act specifically provides how it shall be terminated, that is, by order of the Board.

Sec. 111.07 (8), stats., provides:

"Within thirty days from the date of the order of the board as a body, any party aggrieved thereby may petition the circuit court for the county in which he or any party resides or transacts business, for review of the same."

No provision is made for reviewing the findings. Under sec. 111.07 (7 & 8), Employment Peace Act, the Court has power only "to confirm, modify or set aside the order of the Board and enter an appropriate decree." It examines the record to ascertain whether the findings are supported by the evidence. Its judgment may operate only upon the provisions of the order. It is considered, in view of the large discretionary power committed to the Board, that the act affects the rights of parties to a controversy pending before the Board only in the manner and to the extent prescribed by the order. As pointed out in *Hotel & Restaurant Employees' Assn., Local 122, et al. v. Wisconsin Employment Relations Bd., et al.*, Wis. — N. W. — the jurisdiction of the Wisconsin Board over labor disputes is to some extent concurrent, it being provided in sec. 111.07 (1) Stats.:

"But nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction"

(4) "Final orders may dismiss the charges," etc.

As already stated, the manner and the extent to which the act shall apply in a particular case pending before it is committed to the discretion of the Board. Its commands are found in the order, which determines the status and obligations of all parties to the controversy, not in the findings. In the Board's order under review, there is no provision which suspends the status as employees of the fourteen individual appellants found guilty of unfair labor practices. In this case for the reasons stated there is no conflict in regard to employee status.

In response to the argument made by appellants there is a conflict between the two acts because of the difference in definitions, we point out that these definitions apply only for the purposes of the act in which they are found. In sec. 2 of the National Labor Relations Act certain terms used in the act are defined. That section begins "When used in this act," the various terms defined mean thus and so. Definitions of terms in the Employment Peace Act are found in sec. 111.02. That section begins: "When used in this chapter," the term defined includes or means thus and so. In controversies in which the National Labor Relations Board takes jurisdiction, it will in the course of its determination apply the definitions contained in the National Labor Relations Act. When the Wisconsin Employment Relations Board takes jurisdiction of a labor dispute it will apply the definitions contained in the Employment Peace Act in formulating its determinations. Conflict between the two acts can arise only with respect to orders issued by each of the Boards dealing with the same situation. No matter how arrived at by the boards there can be no conflict if there is none in the order dealing with the same labor dispute. For the reason stated we discover no conflict in the two acts on account of the difference of definitions of the terms to be found in them.

When appellants concede that the state may punish unlawful acts of strikers who are engaged in striking because of unfair labor practices of their employer, they concede the power of the state to deal with some aspects of every labor dispute. In the case of the National Labor Relations Act the jurisdiction of the federal authority is not aroused until such a situation has arisen that interstate commerce is impeded or obstructed. On the other hand, state action is regulatory in its nature and is designed to bring about industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services for the promotion of the general welfare. The federal act deals with a situation that has arisen. The state act seeks to forestall action which may lead to disorder and loss of life and property.

Appellants specified nine ways in which the state and federal acts conflict but as already pointed out, these con-

licts do not exist until the National Labor Relations Act is applied by the National Labor Relations Board in a particular case. As has already been pointed out state power is not destroyed by federal action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by the National Labor Relations Act. Its power is suspended so far as is necessary to give effect to that act.

We might have disposed of this case when we reached the conclusion that the Federal Act not having been invoked with respect to the labor dispute here under consideration there can be no conflict between the two acts. We have thought it best, however, in the interest of certainty to deal specifically with certain questions raised by appellants. If the National Labor Relations Act is repealed, the power of the state over labor relations will be the same as it was before the act was passed. If the Interstate Commerce Act should be repealed the state's power over interstate commerce would not be enlarged. It might have greater latitude in dealing with intra-state commerce but its jurisdiction would be over intra-state commerce, not over interstate commerce.

We wish to point out again that the court has no jurisdiction or authority to pass upon the policy involved in this or any other act. Questions of public policy are primarily for the legislature. If the provisions of this act are too restrictive, as claimed in the brief, the court may not deal with that feature of the act if it is otherwise within the field of constitutional legislative action. In upholding the law against attacks upon its validity on the ground that it is unconstitutional, the court neither commends nor criticizes the public policy involved. If the act is too restrictive, the remedy lies with the legislature and not with the court.

By the court.—Judgment affirmed.

FILE COPY

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NO. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED
ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA, FRED WOLTER,
ESTHER KUSMIEREK, ESTHER GREEN-
MEIER, SOPHIE KOSCHIESKI, FRANCES
CHANDEK, AGNES TANKO, HARRY ROSE,
DAN ROKNICH, TONY CALABRESA, ED-
WARD OKULSKI, PETER BLAZEK, EILIF
TOMTE, EDWARD LARSON AND MIKE
DEMSKI,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS
BOARD, and ALLEN-BRADLEY COMPANY,
a Wisconsin Corporation,

Appellees.

BRIEF IN REPLY TO APPELLEES' STATE-
MENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NO.

ALLEN-BRADLEY LOCAL NO. 1111, UNITED
ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA, FRED WOLTER,
ESTHER KUSMIEREK, ESTHER GREEN-
MEIER, SOPHIE KOSCHIERSKI, FRANCES
CHANDEK, AGNES TANKO, HARRY ROSE,
DAN ROKNICH, TONY CALABRESA, ED-
WARD OKULSKI, PETER BLAZEK, EILIF
TOMTE, EDWARD LARSON AND MIKE
DEMSKI,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS
BOARD, and ALLEN-BRADLEY COMPANY,
a Wisconsin Corporation,

Appellees.

**BRIEF IN REPLY TO APPELLEES' STATE-
MENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM**

Now come the appellants and take issue with appel-
lees' motion to dismiss or affirm; and respectively show
to this Honorable Court that appellees' statement oppos-
ing jurisdiction is without merit.

NATURE OF ACTION AND RULING BELOW

Appellants adopt as their statement of the nature of the Case and ruling below the statements as set forth in Sections 2 to 7 inclusive, of the statement of jurisdiction heretofore filed with the Clerk of this Court.

Appellants, in reply to the motion of appellees to dismiss or affirm and statement opposing jurisdiction filed June 16, 1941 show as follows:

SUMMARY OF ARGUMENT

Point 1. The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States, namely, the National Labor Relations Act, 49 Stat. 449.

Point 2. There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

Point 3. The Supreme Court of the State of Wisconsin erroneously denied certain rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

Point 4. The decision by the Wisconsin Supreme Court required analysis and exposition of the rights, benefits and privileges of appellants under the Federal Statute, and Construction of a Federal Statute in relation to the State Act regulating the same subject, in order to render a decision on issues in the case. —

ARGUMENT

Point 1.

The Supreme Court of the State of Wisconsin Erroneously Construed a Statute of the United States.

By stipulation, it was conceded that the business of appellee, Allen-Bradley Company, is of such character and extent that it is subject to the National Labor Relations Act. Therefore appellant union and individual appellants are entitled to protection and benefits of the National Act. The Wisconsin Supreme Court erroneously construed that the National Act was inapplicable to the parties involved in the instant case because no order has been issued by the National Board, with respect to the labor controversy between the parties involved in this case.

The Wisconsin Court erred in the following statements contained in the reported decision, 237 Wis. 171, construing the National Act:

"In determining whether the Employment Peace Act is repugnant to the provisions of the National Labor Relations Act, it is of little moment whether we say that the National Act confers rights and privileges upon employees or organizations of employees, or how we describe its effect upon employees. Both from the language of the act and the construction which has been placed upon it by the United States Supreme Court, it is apparent that the act operates effectively in a particular case only in the way and to the extent which is determined by the orders of the National Labor Relations Board. If an employer indulges in Sec. 8 of the act, the sole redress of the employees is to charge the employer with such unfair labor practices before the Board. When such a charge is made, the Board may or may not in its discretion decide to take jurisdiction of

the controversy. Its determination will depend upon whether it finds the situation is such as to substantially affect interstate commerce. When it acts, the order of the Board determines the manner in which and the extent to which the act shall be effectively applied to the particular situation being dealt with. If the determination of the Board together with the force of public opinion is not sufficiently persuasive to bring about compliance with the Board's order, the Board may then apply to the proper Circuit Court of Appeals for enforcement of the order." 237 Wis. at p. 178.

"The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts but is one of jurisdiction between the state and federal governments. Inasmuch as the National Labor Relations Act depends for its effective operation upon the determination of the National Labor Relations Board, there can be no conflict between the acts until they are applied to the same labor dispute. They are upon two different planes. The National Labor Relations Act deals with labor relations only as a means of protecting interstate commerce. The Employment Peace Act deals with labor relations in the exercise of the police power of the state. To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities, both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding.

"In this case the employer has never been charged with an unfair labor practice nor has the National Labor Relations Board ever been requested to determine who is the proper bargaining representative. Consequently, the National Labor Relations Act has

never been applied to the labor dispute here under consideration and it may never be applied, depending upon the exercise of the discretion of the National Labor Relations Board. Therefore, there can be no conflict of jurisdiction between state and federal authority in this case. This conclusion does not depend upon the language of the two acts. If the language of the Employment Peace Act was identical with that of the National Labor Relations Act and in a particular case the National Labor Relations Board took jurisdiction, the jurisdiction of the Wisconsin Employment Labor Relations Board would be ousted notwithstanding the identity in language of the two acts and the determination made by the National Labor Relations Board would be controlling. The action of Congress leaves to the state full authority to deal with labor relations generally. Congress exercises its power in the interest of interstate commerce. With that subject the state has nothing to do. Its power to regulate labor relations is derived from an entirely different source,—the power to promote the peace, morals, health, good order and general welfare of the people as a whole. It may not, however, in the exercise of that power encroach upon the federal domain.” 237 Wis. at p. 179.

“Conflict between the two acts can arise only with respect to orders issued by each of the Boards dealing with the same situation. No matter how arrived at by the boards there can be no conflict if there is none in the orders dealing with the same labor dispute. For the reason stated we discover no conflict in the two acts on account of the difference of definitions of the terms to be found in them.” 237 Wis. at p. 184.

“In the case of the National Labor Relations Act the jurisdiction of the federal authority is not aroused until such a situation has arisen that interstate commerce is impeded or obstructed. On the other hand,

state action is regulatory in its nature and is designed to bring about industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services for the promotion of the general welfare. The federal act deals with a situation that has arisen. The state act seeks to forestall action which may lead to disorder and loss of life and property." 237 Wis. at p. 184.

The foregoing quotations from the decision are in conflict with the construction of the National Act contained in:

N.L.R.B. vs. Newport News Shipbuilding and Drydock Co., 308 U.S. 241, 60 S. at 246, 84 L. Ed. 219.

Republic Steel Corp. vs. N.L.R.B., 311 U.S. 7, 85 L. Ed. 1.

N.L.R.B. vs. Jones and Laughlin Steel Corp., 301 U.S. 1.

Consolidated Edison Company vs. N.L.R.B., 305 U.S. 197.

A.P. of L. vs. N.L.R.B., 308 U.S. 401, 60 S. Ct. 300, 84 L. Ed. 347.

It is clear that the National Labor Relations Act was before the Court and was construed in relation to Constitutional issues raised in the pleadings. This assuredly raises a substantial Federal Question establishing this Court's jurisdiction.

Point 2.

There Was Drawn in Question the Validity of a Statute of the State of Wisconsin on the Ground of its Being Repugnant to the Constitution and a Law of the United States and the Decision of the Supreme Court of the State of Wisconsin was in Favor of its Validity.

The pleadings establish that the Wisconsin Act and the jurisdiction of the Wisconsin Board were challenged as unconstitutional as applied to parties subject to National Act, by reason of the interstate character of the company's business. The two main grounds asserted were that the two Acts generally regulate the same subject of labor relations and collective bargaining and that the National Act has pre-empted the subject; or, if not pre-empted, the Wisconsin Employment Peace Act as applied to interstate commerce is so inconsistent and in conflict with the National Act that the two acts cannot consistently stand together.

The Wisconsin Court refers to these issues in the following language:

"While appellant used the term 'unconstitutional,' their argument is that the state law can have no application to a manufacturer subject to the National Labor Relations Act because the jurisdiction of the National Labor Relations Act has pre-empted the field of labor relations in cases where the employer is carrying on an industry in interstate commerce.

"We enter upon an examination of the contentions of the plaintiffs and the arguments made in support thereof fully aware that we are dealing with one of the most difficult as well as delicate questions presented to the courts of this country, to wit: the delimitation of the power of the state and the federal government over a matter which is subject to some

extent to their concurrent jurisdiction." 237 Wis. at p. 171.

The Wisconsin Supreme Court rejected the constitutional objections above set forth in sustaining the constitutionality of the Wisconsin Act as applied to interstate commerce.

In their statement opposing jurisdiction appellees assume that issues raised were correctly decided by the Wisconsin Court. These very assumptions establish the substantial character of the Federal question.

No decision has as yet been rendered by this Court, determining whether a State Labor Relations Act may validly be enforced as to enterprises engaged in interstate commerce and subject to the National Act. The Wisconsin Supreme Court, in the instant case, and in *F. Reuping Leather Co. vs. Wisconsin Labor Relations Board*, 228 Wis. 473, and the New York Court of Appeals in *Davega City Radio, Inc. vs. New York Labor Relations Board*, 281 N.Y. 13, 22 N.E. (2nd) 145, have held that the National Act has not pre-empted the subject, although enacted pursuant to the Commerce Clause, and that the State Labor Relations Act may validly be enforced as to employers whose business constitutes interstate commerce.

The public importance of a determination of this question is evident. Particularly is this so in this case where the plan of regulation of the subject as embodied in the Wisconsin Act is in violent conflict with the National Act. The Congressional records establish that the Wisconsin Act embodies many provisions which Congress has refused to include in the National Act.

So long as the issues raised in this case are undetermined, the National Policy as to labor relations of industries subject to the National Act, may be interfered

with and undermined by enforcement of a contrary and conflicting State Statute regulating the same subject.

The decision affirming the constitutionality of the Wisconsin Employment Peace Act, as applied to interstate commerce in the instant case, raises a Federal question of the extent and exclusiveness of Federal authority over labor relations regulated by the National Act in the exercise of the powers conferred on Congress under the Commerce Clause.

Point 3.

The Supreme Court of the State of Wisconsin Erroneously Denied Certain Rights, Privileges and Immunities Specially Set Up and Claimed by Appellant Under a Statute of the United States.

Under Section 2, (3), N.L.R.A. as construed in numerous decisions, set forth in our statement of jurisdiction, the fourteen individual strikers are entitled to the continued protection and benefits of the National Act even though they had committed the minor acts of violence or misconduct set forth in the findings of fact. Appellees urge that in this case the Wisconsin Supreme Court had construed the "final order" as not having the effect of terminating the employee status of the fourteen appellants because no specific order was issued by the State Board to that effect.

The Wisconsin Supreme Court, in arriving at the foregoing conclusion, did not deal with the issue which appellants raised. Appellants never contended that the final order had the effect of terminating their actual employee status. It was contended that the conclusion of law, finding that they, as strikers, had committed employee unfair labor practices resulted in the loss of

their statutory classification as "employees" entitled to statutory protection from employer unfair labor practices and otherwise entitled to statutory protection of their rights to self organization and collective bargaining which exists in favor of individuals who fit into the definition of "employee" under Sec. 111.02 (3) of the Wisconsin Act. This section specifically provides that when used in the Act, the term "employee" shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute and *who has not been found to have committed or to have been a party to any unfair labor practice set forth in Section 111.06 (2), Wis. Stat. (1939).* The "Final Order" specifically found that as strikers, the individual appellants had committed employee unfair labor practices. This resulted in the loss of their status as "employees" for all purposes of the Wisconsin Act. The decision failed completely to consider the special effect of the Wisconsin Board's finding of unfair labor practices by a striking employee—as distinguished from an employee not on strike—on his statutory privileges and immunities which otherwise exist. By not considering this issue in its decision, the Court has not eliminated the conflict between the two acts in this vital respect. In legal effect, affirmance of the Final Order destroys the employee status for statutory purposes, which continues under the National Act for like purposes.

Furthermore, the decision of the Wisconsin Supreme Court in this case is in conflict with its decision on precisely the same question in *Hotel and Restaurant Employees International Alliance, Local 122 vs. Wisconsin Employment Relations Board*, 236 Wis. 329, 294 N.W. 623. In this case, decided two months before the decision in the instant case, the Court declared that

a striking employee loses his employee status by engaging in an unauthorized strike, which, under the Wisconsin Act, constitutes an unfair labor practice even though no specific order to that effect was made by the Wisconsin Board. In view of these conflicting decisions, it is impossible to determine whether the Wisconsin Court intended to reverse its ruling, as made in the aforementioned case, and the effect of that decision on appellants in this case.

Although the Wisconsin Supreme Court, in construing the Wisconsin Act in this case, ruled that appellants' status as employees of the Allen-Bradley Co. continued—which we did not question—it did not rule that such employee-status continued for purposes of the Wisconsin Act so that the Wisconsin Board would be legally obligated to protect appellants from employer unfair labor practices and otherwise permit them to exercise the statutory benefits accruing to "employees," as defined in the Act. The decision is completely silent on this point. The Wisconsin Act is clear, by its unequivocal terms, that such immunities and protection are extinguished as a result of the Board's findings, because appellants no longer fit into the classification of employees protected by the Act.

Regardless of what reasoning was contained in its decision, the Wisconsin Supreme Court affirmed the final order of the Board, which by the terms of the Wisconsin Act, excludes appellants from the continuance of their employee-status for the purposes of the Act. The effect of this ruling is to authorize the employer to discharge the appellants without regard as to whether such discharge constitutes an employer unfair labor practice prohibited by the National Act. In this respect, the Board's

"Final Order" runs counter to the duty imposed upon the employer by the National Act, not to commit a discriminatory discharge of the appellants. The effect of the Board's "Final Order" on appellants' benefits and immunities as striking employees under the National Act constitutes a substantial Federal question.

Point 4.

The Decision by the Wisconsin Supreme Court Required Analysis and Exposition of the Rights, Benefits and Privileges of Appellants Under the Federal Statute, and Construction of a Federal Statute in Relation to the State Act Regulating the Same Subject, in Order to Render a Decision on Issues in the Case.

No more persuasive argument is necessary to support the jurisdiction of this court than the contents of the decision itself, which revolves about an analysis and exposition of the rights, privileges and immunities or lack thereof of "employees" under the National Act, and the construction and applicability to the appellants of said National Act. The basis for the Order affirming the jurisdiction of the State Board involved the necessary relation between the Federal statute and the State statute insofar as both were regulatory of the same subject involving interstate commerce. These tests establish the substantial character of the Federal question involved in the decision of the Wisconsin Supreme Court.

Wherefore appellants respectfully submit that the appellees' motion to dismiss or affirm the decision of the Supreme Court of the State of Wisconsin should be

denied; that appellees' statement in opposition to jurisdiction is without merit and should be disregarded; that this honorable court has jurisdiction to hear this appeal under Sec. 237 (A) of the Judicial Court (28 U.S.C. 344 A); that this Honorable Court hear appellants' appeal upon its merits. In any event, the appellants submit that a substantial and important Federal question is presented; that certain titles, privileges, rights and immunities specifically set up and claimed by appellants under a statute of the United States, to-wit: the National Labor Relations Board were denied and ignored, and further submit that this Honorable Court has jurisdiction to review such decision of the Supreme Court of the State of Wisconsin under the provisions of the Section 237 B and C of the Judicial Code (28 U.S.C. 344 B.C.)

Respectfully submitted,

LEE PRESSMAN,
JOSEPH KOVNER,
ANTHONY WAYNE SMITH,
Attorneys for Appellants.

MAX E. GELINE,
Of Counsel.

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IN THE
Supreme Court of the United States

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OCTOBER TERM, 1941
No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL,
RADIO AND MACHINE WORKERS OF AMERICA, ET AL.,
Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND
ALLEN-BRADLEY COMPANY,
Respondents.

Appeal From the Supreme Court of the State
of Wisconsin

APPELLANTS' BRIEF

✓ LEE PRESSMAN
✓ JOSEPH KOVNER
✓ ANTHONY WAYNE SMITH
MAX GELINE

Attorneys for Appellants.

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APPELLANTS' BRIEF

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin in this case is reported in 237 Wis. 164, 295 N. W. 791, and is also found in the Record at pages 37-54. The opinion of the Circuit Court of Milwaukee County is not reported but appears on pages 24-26 of the Record.

STATEMENT AS TO JURISDICTION

Statement of Jurisdiction has been separately filed in the above matter, as required by Supreme Court Rule 12, Section 1, and is therefore omitted herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the federal Constitution, which provides:

"Congress shall have the power to regulate the commerce with the foreign nations and among the several states."

National Labor Relations Act (Act of June 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Sec. 151-166)

Wisconsin Peace Employment Act, Wisc. Laws of 1939, c. 57, Wisc. Stat. (1939) c. 111.

The provisions of these two statutes have been printed in parallel columns as an Appendix to this Brief.

STATEMENT OF THE CASE

The appellants are certain employees of the respondent, Allen-Bradley Company, and their Union, Allen-Bradley Local 1111, United Electrical, Radio and Machine Workers of America. The Company, one of the appellees, is a manufacturer of electrical control equipment in the City of Milwaukee, Wisconsin, and employs approximately 700 workers. It was stipulated that the Company purchases from sources and makes sales outside the State of Wisconsin, so that it is subject to the National Labor Relations Act, and the jurisdiction of the National Labor Relations Board, (R. 2, 22, 36) (hereinafter sometimes referred to as the Federal Act and the Federal Board.)

The other appellee is the Wisconsin Employment Relations Board (hereinafter sometimes referred to as the State Board) administering the Wisconsin Employment Peace Act (hereinafter sometimes referred to as the State Act).

These proceedings originally were commenced before

the State Board, in connection with a labor dispute between the Union and the Company. Prior to May 1939, there had been in force an exclusive bargaining contract between the two, governing the terms and conditions of employment at the Company's plant. As the date for renewal of the contract approached, the Union, pursuant to the terms of the contract, gave notice of cancellation in advance. For three weeks the parties met in an effort to reach a new agreement, but without success. (R. 29, 33) On May 10, 1939, a strike was called by the Union after the employees of the Company had voted by secret ballot ordering such strike. (R. 14)

On or about June 14, 1939, the Company filed a complaint with the Wisconsin Employment Relations Board against the Union and its members charging them with violating the provisions of Sections 111.06 (2) and (3) of the Wisconsin Employment Peace Act. In its prayer for relief, the Company, among other matters, requested "that the Board ascertain and determine which of the members of said union have committed or have been parties to any unfair labor practices, and to declare that such persons are no longer employees of the company, as defined in Section 111.02 (3) (b) of the Wisconsin Statutes." (R. 28-31)

At the hearing the Union objected to the jurisdiction of the State Board. The objections were based on the ground that since the Allen-Bradley Company is engaged in interstate commerce, it is subject exclusively to the provisions of the National Labor Relations Act, that, further, the State Act as applied to interstate commerce is unconstitutional for the reason that it is so inconsistent with, and repugnant to the Federal Act that the two acts cannot consistently stand together insofar as they both constitute regulations of the same subject, namely, labor relations and collective bargaining affect-

ing interstate commerce. All these objections were overruled by the State Board. (R. 37)

After a hearing, the State Board issued an interlocutory order in which it ordered and directed the Union to cease and desist from conducting the strike in a manner contrary to the provisions of the Act. An appeal was taken from this interlocutory order to the Circuit Court of Milwaukee County. The jurisdiction of the State Board was again attacked. The Circuit Court held that there was no conflict between the State and Federal Acts as applied to the case and upheld and confirmed the jurisdiction and the interlocutory order of the State Board. These interlocutory proceedings are not set forth, but only referred to, in the Record. (R. 13, 24)

On February 1, 1940, the State Board entered its "Final Order," containing its findings of fact and conclusions of law. (R. 13-17)

As to the Union, the Board found that it had engaged in certain wrongful acts, which were set forth in the following language:

"5. That from the beginning of said strike, the Union has engaged in mass picketing at all of the entrances to the factory for the purpose of hindering and preventing the pursuit of lawful work and employment by employees of the Allen-Bardley Company who desired to engage in such lawful work or employment.

6. That after the commencement of said strike, the Union obstructed and interfered with entrance to and egress from the factory of the company, and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory of the company.

7. That the Union, by its officers and many of its members, threatened bodily injury and property

damage to many of the employees desiring to continue their employment with the company.

8. That the Union required of persons desiring to enter the factory without interference that they obtain passes from the Union at its strike headquarters.

9. That the Union, by its officers and many of its members, picketed the domiciles of many employees desiring to continue their employment with the company." (R: 14)

The unlawful acts committed by the individual appellants are set forth in the "Final Order," in the following language:

"11. That Fred Wolters was, prior to the time of the strike, an employee of the Allen-Bradley Company, and president of the Union, and that by threats, force and coercion of other kinds, he attempted to intimidate and to prevent certain employees of the company who desired to continue their employment therein, from pursuing their lawful work and employment.

12. That Esther Kuzmerck, Esther Greenmeier, Sophie Kozcierski, Frances Chandek and Agnes Tanko, were prior to the time of the strike, employees of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent Ruth Batt, an employee of the Allen-Bradley Company, who desired to continue her employment therein, from pursuing such lawful work and employment, and that the said named persons committed an assault and battery upon the person of said Ruth Batt.

13. That Harry Rose and Dan Roknich were, prior to the time of the strike, employees of the Allen-Bradley Company, and that by threats, intimidation, assault and force, attempted to prevent one Marie Rudella, an employee of the Allen-Bradley Company, who desired to continue her employment therein, from pursuing her lawful work and employment.

14. That Tony Calabreesa and Edward O'Kulski, were, prior, to the time of the strike, employees of the Allen-Bradley Company, and that by assault, force and coercion, attempted to prevent one Ann Cycosch, who desired to continue her employment with the Allen-Bradley Company, from pursuing her lawful work and employment.

15. That Peter Blazek, prior to the time of the strike an employee of the Allen-Bradley Company, assaulted one Anton Stamwick, an employee of the Allen-Bradley Company, and by such assault attempted to intimidate said Anton Stamwick and to prevent him from continuing his employment with the Allen-Bradley Company.

16. That Eilif Tompte and Edward Larson, prior to the time of the strike, employees of the Allen-Bradley Company, were arrested and convicted of attempting to damage property belonging to employees of the Allen-Bradley Company, who continued to work for said company during the strike, and that such misdemeanor was committed in connection with the controversy then existing between the company and the Union.

17. That Mike Dembski, prior to the time of the strike an employee of the Allen-Bradley Company, was arrested on the picket line maintained by the Union, armed with concrete rocks, and that said Dembski intended to use such rocks for the purpose of intimidating employees of the company who desired to continue their employment." (R. 14-15)

On the basis of the foregoing findings of fact, the State Board made and entered conclusions of law with reference to the Union and the fourteen appellants. Regarding the Union, the Board ruled as follows:

"1. That the Union is guilty of unfair labor practices in the following respects:

(a) Mass picketing for the purpose of hindering and preventing the pursuit of lawful work or em-

ployment by persons desiring employment by the Allen-Bradley Co.

(b) Threatening employees desiring to pursue their work and employment with the company, with bodily injury and injury to their property;

(c) Obstructing and interfering with entrance to and egress from the factory of the company;

(d) Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory of the company;

(e) Picketing the domiciles of employees of the company.

Regarding the individual employees, the Board made and entered the following conclusion of law:

"2. That all the following named employees are guilty of unfair labor practices by reason of threats made by them to other employees, assaults committed by them arising out of the controversy between the Union and the company as described in the findings of fact above: Fred Wolters, Esther Kuzmerck, Esther Greenmeier, Sophie Kozcierski, Frances Chandek, Agnes Tanko, Harry Rose, Dan Roknich, Tony Calabreesa, Edward O'Kulski, Peter Blazek, Eilif Tompte, Edward Larson, and Mike Dembski." (R. 16)

After making the foregoing conclusions of law, the Board issued an "Order" as follows:

"It is ordered that the respondent, Allen-Bradley Local 1111, United Electrical, Radio and Machine Workers of America, its officers, agents, successors, assigns and members, shall:

1. Cease and desist from:

(a) Engaging in mass picketing at or near the plant of the company.

(b) Threatening employees of the company with physical injury, property damage, or otherwise.

(c) Obstructing or interfering with entrance to and egress from the factory of the company.

(d) Obstructing or interfering with the free and uninterrupted use of the streets, public roads and sidewalks surrounding the factory of the company.

(e) Picketing the domicile of any employee of the company." (R. 16-17)

Upon petition to review, the Circuit Court of Milwaukee sustained the final Order of the State Board. (R. 26-29) On appeal, the Wisconsin Supreme Court affirmed the judgment of the Circuit Court thereby sustaining the jurisdiction of the State Board and upholding the constitutionality of the State Act. The Court denied a motion for rehearing. (R. 57)

The substance of our position is that the Wisconsin Employment Peace Act is an unconstitutional attempt on the part of the State of Wisconsin to hamper and obstruct the administration of an orderly national policy with regard to collective bargaining in industrial relations affecting interstate commerce, and, we conclude, the State Board was without jurisdiction to enter the final order, upheld by the state courts.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of the State of Wisconsin erred:

(1) In construing the National Labor Relations Act as not being applicable to the appellants until and unless an order is issued by the National Labor Relations Board in a proceeding before it to which the employer, employees and the Union herein are parties.

(2) In ruling that the final order of the Wisconsin Employment Relations Board finding the fourteen individual appellants herein guilty of unfair labor practices did not deprive said appellants of the protection against employer unfair labor practices and of the right to collective bargaining and

other concerted action for their mutual aid and protection.

(3) In ruling that Sec. 111.02, Subsection 3, (b) of the Wisconsin Employment Peace Act is not in conflict with Section 2, Subsection 3 of the National Labor Relations Act, as applied to the individual appellants in this case and the appellant union, and therefore is void and unconstitutional by reason of such conflict.

(4) In failing to rule that the Wisconsin Employment Peace Act on its face and as construed and applied to the appellants is void and unconstitutional for the reason that the said Wisconsin Act and the National Labor Relations Act are both regulatory of the same general subject matter of employer-employee relations and both regulate collective bargaining relations between employers and employees, and that Congress in enacting the said National Labor Relations Act has preempted the subject covered by said Act in the exercise of its powers to regulate interstate commerce.

(5) In ruling that appellants are without standing to raise constitutional issues arising from the conflict between the two aforesaid federal and state labor relations acts.

(6) In ruling that the Wisconsin Employment Peace Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the National Labor Relations Act pursuant to its constitutional power to regulate commerce between the states.

SUMMARY OF ARGUMENT

I.

The federal government in the National Labor Relations Act and related legislation has laid down a policy governing labor relations affecting interstate commerce to the exclusion of any state legislation dealing with precisely the same subject. The assumption of juris-

diction by the Wisconsin Board was done under a State Act dealing with precisely the same aspects of labor relations as the Federal Act. The many decisions of this Court hold that a federal statute on a subject requiring a uniform national policy suspends state legislation, whether conflicting or complementary. The constitutional supremacy of such federal legislation attaches to the action of Congress and not to the action of its agency in a particular case.

The nature of labor relations is such that it requires exclusive federal control. The exercise of the rights guaranteed by Section 7 of the Federal Act can be abridged by subtle and indirect methods of interference. The enforcement of the national labor policy depends upon the evaluation of complex factors in particular cases and a state agency administering a state law modeled in detail after the Federal Act must be given the same discretion as the Federal Board. But this obstructs the development of a uniform national policy because it will inevitably produce diverse results in the same cases.

The present emergency makes more imperative than ever the necessity for a uniform national policy encouraging collective bargaining in labor relations affecting interstate commerce.

II.

The provisions of the Wisconsin Employment Peace Act are repugnant to, and in conflict with, the provisions of the National Labor Relations Act.

A State Act in harmony with the Federal Act may, arguably, be sustained, subject to the supremacy of the Federal Board in particular cases. But obviously, federal laws passed in aid of a granted power supersede state statutes with which they conflict. The Wisconsin

Act conflicts with the Federal Act in several important respects, namely; in the declaration of public policy, the definition of a labor dispute, the rights of a minority to bargain collectively in the absence of a majority, the determination of the appropriate bargaining unit, and in the unfair labor practices of employees and unions.

These conflicts show that the entire scheme of the Wisconsin Act is in conflict with the Federal Act. The Federal Act requires violators to engage in collective bargaining through freely chosen representatives, the state act penalizes violators by discouraging collective bargaining as a penalty for the breach of minor police laws.

III.

The order of the State Board upheld by the State Courts is beyond the Constitutional jurisdiction of the State Board. The construction given to the State Board Order and the State Act by the Wisconsin Supreme Court in no wise alters the fact that both the Order and Act deal with precisely the same subject as the Federal Act, and in no wise eliminates the conflicting provisions of the State Act. Under the circumstances of this case, therefore, the State Board lacked jurisdiction to entertain the original complaint of the Company against the appellants.

IV.

The Wisconsin Employment Peace Act is an unconstitutional exercise of the police power of the state. The State Act invades the control embodied in the Federal Act over obstructions to interstate commerce due to industrial disputes. The validity of the entire State Act is raised in these proceedings because the State Board wrongfully took jurisdiction in the first instance

under the basic provisions of the entire State Act. A decision against the constitutionality of the State Act will not prevent the proper exercise of the police power of a state to regulate the aspects of labor relations affecting the good order and peace of the state, and the security of its citizens. But the federal labor policy must be the foundation of any state labor legislation. The states may not undermine that foundation. The Wisconsin Act is an obstacle to the effectuation of the policies of the Federal Act. It is impossible to develop a sound national labor policy if the States are permitted to destroy the practices and procedures of collective bargaining in labor relations affecting interstate commerce protected by federal law.

ARGUMENT

I.

The Federal Government in the National Labor Relations Act and Related Legislation Has Laid Down a Policy Governing Labor Relations Affecting Interstate Commerce to the Exclusion of Any State Legislation Dealing With Precisely the Same Subject.

When this case originally came on for hearing before the State Board, the Company conceded that it was subject to the National Labor Relations Act. The Union then moved to dismiss the proceedings upon the ground of lack of jurisdiction in the State Board. Its motion was denied by the State Board, (R. 36) and that denial subsequently upheld in the state courts. That original determination is the essence of this case, because from that point on, the State of Wisconsin was endeavoring to regulate the subject matter of a valid federal statute.

It can hardly be denied that the Wisconsin Employ-

ment Peace Act deals with precisely the same subject matter as the National Labor Relations Act. The two statutes have corresponding provisions, not only with regard to the rights and duties of employers and employees, but even with regard to administrative procedure and judicial review and enforcement.

Congress in the Federal Act declared the national policy to encourage:

"the practice and procedure of collective bargaining by protecting the exercise by workers of their full freedom of association and self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection."

Section 111.01, Wisconsin Act, declares the public policy of the State of Wisconsin with regard to collective bargaining.

Section 2 of the Federal Act, and Section 111.02 of the State Act contain definitions of persons, employers, employees, representatives, labor organizations, labor disputes, and similar matters. Both acts create an administrative board to enforce the provisions thereof.

Section 7 of the Federal Act is the heart of the National Act, and provides as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection:"

Section 111.04, Wisconsin Act, is the parallel provision and provides as follows:

"111.04. Rights of Employees. Employees shall have the right to self-organization and the right to

form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Section 8, of the Federal Act, sets forth unfair labor practices of employers. Section 111.08 (1) of the Wisconsin Act lists employer unfair practices.

The two novel additions to the Wisconsin Act, which are nowhere contained in the Federal Act, are Sections 111.06 (2) (a) to (j), which prohibit unfair labor practices by employees, and Section 111.06 (3) which prohibits unfair labor practices by labor organizations.

Section 9 of the Federal Act provides for the designation and rights of representatives and the determination of collective bargaining units. Section 111.05 of the Wisconsin Act also regulates the designation of representatives and the determination of collective bargaining units. Section 10 of the Federal Act grants exclusive authority to the National Labor Relations Board to enforce the provisions of the Act. Section 111.07 sets forth the procedure for the enforcement of the state act by the State Board.

The foregoing references establish that the Wisconsin Act, as much as the Federal Act, is a law governing the precise subject of labor relations and collective bargaining, affecting interstate commerce.

The constitutionality of the Federal Act is no longer open to any challenge. It is a valid exercise of congressional power over interstate commerce. We think it is established that the exercise of the federal power to protect interstate commerce, in a specific way, over a subject requiring national protection excludes any state action, whether it be conflicting or complementary. An

explicit declaration of exclusive authority is not necessary. *Gilvory v. Cuyahoga Valley R. Co.*, 292 U. S. 57, 54 S. Ct. 575. In the case of the National Labor Relations Act, Congress specifically gave exclusive jurisdiction to its agency, the National Labor Relations Board.

Section 10 (a), National Labor Relations Act, reads as follows:

"Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

In many decisions, Congressional protection of interstate commerce has resulted in the suspension of state legislation governing the same subject.

In *Erie Railroad Company v. People of the State of New York*, 233 U. S. 671, 34 S. Ct. 756, an action was brought for penalty for alleged violations of a state law regulating employees' hours of labor. The defendant's answer alleged that it was engaged in interstate commerce and that the Federal Hours of Service Act applied and was exclusive; and that, therefore, the State Act was unconstitutional. The defendant was convicted. On appeal, the United States Supreme Court held that Congress had preempted the field of hours of service of employees of railroads engaged in interstate commerce and reversed the decision of the state court. The Court stated, in its decision:

"Indeed, when Congress acts in such a way as to manifest its power to exercise its constitutional authority, the regulating power of the state ceases to exist." 233 U. S. at p. 681.

See also *Northern Pacific Railroad Company v. State of Washington*, 222 U. S. 370, 32 S. Ct. 170, where a state hours of services law was held unconstitutional for the reason that the Federal Act was exclusive.

In *Southern Railroad Company v. Reid*, 222 U. S. 424, 32 S. Ct. 140, the validity of a North Carolina statute fixing a penalty upon a railroad for failure to accept freight when tendered under certain conditions was challenged. Defendant contended that the statute was unconstitutional because it burdened interstate commerce and conflicted with federal legislation. The court in a unanimous opinion summarized previous decisions respecting the extent and occasion of state regulation of interstate commerce, and stated:

"It is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised."
222 U. S. at p. 436.

In *Napier v. Atlantic Coastline Railroad Company*, 272 U. S. 605, 47 S. Ct. 207, an appeal was taken from a judgment enjoining the operation of a statute requiring automatic doors for locomotive fire boxes. The railroad contended that the Federal Boiler Inspection Act and Safety Appliances Act occupied the field of regulation of railroad equipment used in interstate commerce, so far as to preclude state legislation on that subject. The Supreme Court of the United States held the state law unconstitutional because federal legislation governed the same subject. The Court declared that the fact that the Interstate Commerce Commission had not seen fit in exercising its authority to impose the same kind of regulations had no bearing on the conclusion that the federal acts had fully occupied the field, thus

precluding state legislation. The Court, through Mr. Justice Brandeis, said:

"The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automatic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission led to that conclusion. *Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purpose.* . . . If the protection now offered by the commission's rules is deemed inadequate, application for relief must be made to it. The commission's power is ample." (Italics added) 272 U. S. at p. 612.

In *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 40 S. Ct. 36, the appeal involved a conflict between the Federal Safety Appliance Act and a state law governing the same subject. Mr. Justice Holmes, in reversing the judgment of the State of Pennsylvania, declared:

"... But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more

can supplement its requirements than they can annul them." 250 U. S. at p. 569.

In the *Charlestown & Western Carolina R. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 35 S. Ct. 715, a South Carolina statute relating to the failure of the terminal carrier to promptly pay claims for damage to interstate shipments was held void because it overlapped the federal statute with respect to the subject and grounds and extent of liability for loss. In this case the Court stated:

"... When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." 237 U. S. at p. 604.

In the *Minnesota Rate Case*, 230 U. S. 352, 33 S. Ct. 729, the Court stated:

"... the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." 230 U. S. at p. 399.

Further in this decision, the Court stated:

"In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible." p. 403.

In *Second Employers' Liability Cases*, 223 U. S. 1, 32 S. Ct. 169, the Court held that the Employers' Lia-

bility Act of April 22, 1908, as amended by the Act of April 5, 1910, regulating the liability of common carriers by railroad to their employees, also held to supersede laws of the several states insofar as they covered the same field. The Court stated:

"True, prior to the present act the law of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. (Citing cases). The inaction of Congress, however, in no wise affected its power over the subject. (Citing cases) And now that Congress has acted, the laws of the States, insofar as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." (citing cases) 223 U. S. at pp. 54-55.

The Wisconsin Supreme Court has itself construed the State act to deal with the same subject as the Federal Act. It said:

"The National Labor Relations Act deals with labor relations only as a means of protecting interstate commerce. The Employment Peace Act deals with labor relations in the exercise of the police powers of the State." (R. 48)

The major premise to its upholding of the State Act, is that

"The action of Congress leaves to the state full authority to deal with labor relations generally." (R. 49)

But this premise overlooks the fact that the Wisconsin Act specifically and expressly deals with the same aspects of labor relations as the Federal Act.

Both deal with employer interference with rights of employees to organize, both define the employment relations for the purpose of collective bargaining, both define the bargaining unit, and both establish the duty to bargain collectively.

We do not say that Wisconsin may not legislate upon the incidents of the employment relation as they relate to peace, morals, health, good order and general welfare—the objectives embraced within the police powers of a state. We do not say that Wisconsin may not punish, by proper civil or criminal measures, breaches of peace, disorder or acts of force or violence. On the contrary, Wisconsin has adequate powers to do so. It can send strikers to jail for disorderly conduct, unlawful assembly, or riot. But it *may not* require compliance with minor regulations of the police powers as a condition to the exercise of the rights of workers to collective bargaining and the employee status for the purpose of collective bargaining. It may not, in the name of the police power, provide for the regulation of collective bargaining in labor relations which affect interstate commerce when Congress has assumed to regulate the very same aspects of those relations.

It is no answer to say that the State Board may act in the absence of action by the Federal Board. The constitutional supremacy of federal regulation attaches to the action of Congress and not to the action of its delegated agency in particular cases.

In the case of *NLRB v. Newport News Shipbuilding & Drydock Company*, 308 U. S. 241, 60 S. Ct. 246, the company had urged that the company union had operated to the apparent satisfaction of employees since serious labor disputes had not occurred during its existence;

“... and as the men at an election held under the auspices of the Committee had signified their desire

for its continuance, it would be a proper medium and one which the employer might continue to recognize for the adjustment of labor disputes. The difficulty with the position is that the provisions of the statute preclude such a disposition of the case. The law provides that an employee organization shall be free from interference or dominance by the employer. We cannot say that, upon the contradicted facts, the Board erred in its conclusions that the purpose of the law could not be attained without complete disestablishment of the existing organization which had been dominated and controlled to a greater or less extent by the respondent. *In applying the statutory test of independence it is immaterial that the plan had, in fact, not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives.* It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force. We think the statute plainly evinces a contrary purpose, and that the Board's conclusions are in accord with that purpose." 308 U. S. at p. 251. (Italics added)

In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, the Court stated:

"The fact that there appears to have been no major disturbance in that (steel) industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall." 301 U. S. 1 at p. 43.

In *NLRB v. Fainblatt*, 306 U. S. 601, 59 S. Ct. 668, the Court stated:

"The Act on its face thus evidences the intention of Congress to exercise whatever power is constitu-

tionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. . . .” 306 U. S. at p. 607.

Further:

“ . . . It is no longer open to question that the manufacturer who regularly ships his product in interstate commerce is subject to the authority conferred on the Board with respect to unfair labor practices whenever such practices on his part have led or tend to lead to labor disputes which threaten to obstruct his shipments. (Numerous authorities cited.)” 306 U. S. at p. 608.

In *Consolidated Edison Company v. NLRB*, 305 U. S. 197, 59 S. Ct. 206, this Court said:

“But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures, and that was the object of the National Labor Relations Act.” 305 U. S. at p. 221.

The necessity for uniform federal legislation on collective bargaining is apparent. The National Labor Relations Act is only part of a whole legislative program that includes as well such safeguards of collective bargaining as the Norris La Guardia Anti-Injunction Act, the Wage-Hour law and the Walsh-Healey Act. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 498, 60 S. Ct. 982, 998, n. 24.

Labor relations are of such a nature that exclusive control over those affecting interstate commerce is essential to the enforcement of the federal labor relations Act. This Court has recognized that the freedom of

employees to enjoy industrial democracy, guaranteed by the Act, can be destroyed by subtle coercion and frustrations. Thus, in the case of *International Association of Machinists v. NLRB*, 311 U. S. 72, 61 S. Ct. 83, this Court upheld an order of the Board against employer interference, saying:

"Slight suggestions as to the employer's choice between unions may have telling effects among men who know the consequences of incurring that employer's strong displeasure." (311 U. S. at p. 78)

And in the case of *NLRB v. Link Belt Co.*, 311 U. S. 584, 61 S. Ct. 358, this Court reviewed the evidence of employer interference, and said:

"The fact that these various forces at work were subtle rather than direct does not mean that they were nonetheless ineffective. Intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge." (301 U. S. at p. 599)

This Court has recognized that even oral utterances by an employer can produce a coercive interference with the rights guaranteed by the Federal Act. *NLRB v. Virginia Electric & Power Co.*, decided December 22, 1941, 314 U. S.—.

In the same way, this Court has upheld the necessity for the disestablishment of company-dominated labor organizations in order to wipe the slate clean.

H. J. Heinz Co. v. NLRB, 311 U. S. 514, 61 S. Ct. 320.

NLRB v. Newport News Shipbuilding & Drydock Co.
supra:

NLRB v. Link-Belt Co. supra.

The action of a state agency dealing with labor relations covered by the Federal Act can and does result in the same interference as employer action. The notorious Mohawk Valley formula to break strikes and destroy

unions relied most heavily upon the use of local laws to brand the union and its members as outlaws.

Republic Steel Corp. v. NLRB, 3 Cir., 107 F. (2d) 472, 476.

Bethlehem Steel Co. v. NLRB (App. D. C.) 120 F. (2d) 641.

NLRB v. Remington-Rand, 2 Cir., 94 F. (2d) 862, affirming except for minor modifications, 2 NLRB 626, 664.

Rosenfarb, *op. cit. supra*, p. 95.

Surely this Court is aware of the reality that a decision by the State Board which discourages collective bargaining has a repressive effect upon the employees in a particular case. It is not enough to say that the remedies of the Federal Act remain available to the employees to afford them such protection as is proper in the premises. The damage is done by the decision of the State Board, and the seeds of industrial strife are sown.

In the case at bar, a group of workers, exercising their right to collective bargaining and other mutual aid and protection, went on strike when negotiations for a new agreement broke down. The State Board has branded them as outlaws under a state labor relations act, and subjected them to the forfeiture of their collective bargaining rights. How can it be said that these employees are to understand that "it is only for the purposes of the State Act", that they are still entitled to all their rights under the Federal Act, and that, therefore, their exercise of rights guaranteed by the Federal Act has not been subject to any interference. How can it be said that the policy of the Federal Act has been in no wise seriously impeded.

A further example of the obstruction presented to the effectuation of the Federal Act, even by identical provisions of the State Act, is furnished by the recent case

of *NLRB v. Algoma Net Company*, 7 Cir. decided Dec. 9, 1941, 9 L. R. R. 450. In that case an employer, charged with unfair discriminatory discharges under Section 8 (3) of the Federal Act, insisted that the Wisconsin Board had taken jurisdiction in earlier proceedings and "closed" the matter. It appeared that the representative of the Wisconsin Board had advised the employer "to forget about the whole thing" so far as reinstating certain employees was concerned. The Federal Board, however, granted reinstatement to these employees. The Circuit Court of Appeals was not called upon to decide the constitutionality of the Wisconsin Act. It did hold that the Federal Board had jurisdiction and that its decision superseded any decision of the State Board.

The Federal Order was not issued until a year and a half after the discharges took place and the State Board "closed" the matter. (28 NLRB No. 18). It was not upheld by the Court until two and a half years later. In the interim, the force of the disposition by the Wisconsin Board denying reinstatement was added to the employer's commission of the unfair labor practice. True, the employees concerned eventually were afforded the protection of the Federal Act. But for a two-year period, the Wisconsin Act discouraged collective bargaining and obstructed the policy of the national government in labor relations affecting interstate commerce.

We know that the enforcement of a labor relations law must leave "the detection and appraisal of imponderables to the essential function of an expert administrative agency." *International Association of Machinists v. NLRB*, *supra*. One of the principal features of the judicial enforcement of the Federal Act has been the full discretion given to the Board to make decisions in particular cases which will effectuate the

policies of the Act. *NLRB v. Waterman Steamship Corp.* 309 U. S. 206, 60 S. Ct. 493. It is obvious that a state agency administering a state law modeled in detail upon the federal law must be given the same administrative function. And it also follows that such a state agency will reach different results from the Federal Board in the same cases. Accordingly, it seems to us that the nature of the administration of a labor relations act requires that the Federal Act be given pre-empting authority in order to maintain a uniform national labor policy.

The present emergency has made more imperative than ever before the necessity for a uniform national policy on labor relations. To permit the states to regulate the same subject would be to provide for confusion of legal authority and practical results. The federal government has declared a public policy in favor of collective bargaining through freely chosen representatives in order to eliminate any obstruction to interstate commerce. The war has reinforced that policy as essential for uninterrupted defense production as well. The National Labor Relations Act sets up the foundation upon which collective bargaining institutions and practices may be erected. It is basically a simple foundation: employees shall have the right to choose their own representatives without interference by employers, they shall have the right to organize, to bargain collectively, to other concerted action for their mutual aid and protection. To implement its policy, the federal government has in the Act, defined such elements of collective bargaining as the employer-employee relationship, the labor dispute, the unit appropriate for collective bargaining, and the nature of exclusive representation. The Wisconsin Act, in the name of the police power, purports to deal with precisely the same elements of collective bargaining in

labor relations subject to the Federal Act. The Wisconsin Act is an invasion of the federal power.

We do not think it is material here whether the regulations of the Wisconsin Act are in harmony or in conflict with the Federal Act. In the case of *Hines v. Davidowitz*, 312 U. S. 52, 61 S. Ct. 399, the provisions of the Pennsylvania Alien Registration Act were concededly consistent with those of the federal law on the same subject. But this Court held that the very similarities which obviated any conflict in policy, produced a duplication by the state authority that would necessarily impede the operation of the federal law. This Court laid down the following rule:

"And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: Conflicting, contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (312 U. S. at p. 66)

We think the case at bar is governed by the same principle and compels the same result as was reached in the Hines case.

II.

The Provisions of the Wisconsin Employment Peace Act Are Repugnant to and in Conflict with the Provisions of the National Labor Relations Act.

We have urged that the enactment of the Federal Act regulating labor relations affecting interstate commerce excluded any state legislation of the same type on the same relations. Our insistence is based upon the conviction that national production essential to the defense of the nation requires a uniform national labor policy to prevent interruptions to production. It might be argued that states may enact labor relations laws which are in harmony with the federal law. But even in such a case, the paramount jurisdiction of the Federal Act would be recognized and the State Act could not in any way impair the operation of the Federal Act.

Thus, in *Consolidated Edison Company, v. NLRB supra*, this Court held that the validity of the New York State Act was not before it, but it added:

"The State Act, with added details, follows closely the National Act. The State Act provides for collective bargaining, including the conduct of elections to determine the representation of employees, and empowers the State Labor Relations Board to prevent unfair labor practices. In seeking to avoid a clash with Federal authority, the State Act is made inapplicable 'to the employees of any employer who concedes to and agrees with the Board that such employees are subject to and protected by the provisions of the National Labor Relations Act or the Federal Railway Labor Act.' It is manifest that the enactment of this State law could not override the constitutional authority of the Federal government. The State could not add to or detract from that authority." (305 U. S. at p. 223).

The New York Court of Appeals upholding the State Labor Relations Act, nevertheless recognized the supremacy of the Federal Act. It said:

"We may further assume that the police power of the State would warrant the application of the State Labor Relations Act to the labor relations of appellant if the National Labor Relations Act were not in existence (*Minnesota Rate Cases*, 230 U. S. 352, 408). On the other hand, it has long since been settled that where there is a conflict between a statute enacted by Congress pursuant to its delegated powers, e.g., the regulation of interstate and foreign commerce, and a law adopted by a State in the exercise of its police power, then the former prevails. (*Gibbons v. Ogden*, 9 Wheat. [U. S.] 1). If effect were given to the contrary directions of the State law, then the National act would no longer be the supreme law of the land, as is required by Article VI of the Constitution." *Davega City Radio v. State Labor Relations Board*, 281 N. Y. 13, 21, 22 N. E. (2d) 145, 147.

Moreover, the New York State Act specifically provides that its provisions shall not apply to:

"The employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the National Labor Relations Act or the Federal Railway Labor Act . . ." (N. Y. Consol. Laws. Labor Law, Art. 20, Sec. 715.)

The recently enacted Rhode Island Act contains the same provision as this paragraph and is also modeled in detail upon the Federal Act. (Rhode Island Acts (Jan. 1941) c. 1066, Sec. 16)

The Wisconsin Act, upheld in *Reuping Leather Co. v. Wisconsin Labor Relations Board*, 228 Wis. 473, 279 N. W. 673, was then modeled in detail upon the Federal Act. The Massachusetts Act specifically provides that it is not applicable to "any unfair labor practice subject to the National Labor Relations Act."

[Mass. Acts, 1937 c. 436, Sec. 14 (b), IV Mass. Ann. Laws. Supp. (1941) c. 150 A., Sec. 10 (b)]

The Pennsylvania Act, which does have certain differences, defines the term "employer" to exclude any employer subject to the Federal Act. [43 Purdon's Pa. Stat. Sec. 211.3 (c)] See *Abbotts Dairies Case*, 341 Pa. 145, 19 A. (2d) 128

The Utah Act, which is modeled in detail upon the Federal Act, defines its terms so that it applies only to intrastate commerce. Utah Rev. Stat. Supp. (1939) Title 49, c. 1, Secs. 49-1-1, 49-1-3 (6) (7), 49-1-11.

The Wisconsin Act is in conflict with the Federal Act in many important respects.* It follows that the Wisconsin Act must be declared invalid. In *Kelly v. Washington*, 302 U. S. 1, 58 S. Ct. 87, this Court declared:

"The principle is thoroughly established that the exercise by the State of its police power which would be valid if not superseded by Federal action is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together."

And Mr. Chief Justice Stone in the *Hines* case said:

"Federal statutes passed in aid of granted power obviously supersede state statutes with which they conflict." (312 U. S. at p. 79.)

The area of this conflict between the two labor relations Acts embraces the vital elements of each. In sum, the Federal Act seeks to protect interstate commerce from interruptions due to industrial strife by encouraging collective bargaining; the State Act discourages collective bargaining in labor relations affecting interstate commerce, and so stands as an obstacle to the operation of the Federal Act.

* The Minnesota Act, like the Wisconsin Act, contains unfair labor practices by employees, provides for the issuance of cease and desist orders against such practices, and the denial of collective bargaining rights. Mason's, Minn. Stat. 1940. Supp. Secs. 4254-21-40, as amended, 1941 Supp. Secs. 4254-21-36.

It is idle to contend that Congress did not, in the Federal Act, regulate labor relations, but only interstate commerce. The Wisconsin Supreme Court, we respectfully submit, has failed to perceive that the protection of interstate commerce embraces labor relations affecting interstate commerce. There is no difference, under the policy and provisions of the National Labor Relations Act, between labor relations on a boat moving down the Mississippi River and labor relations in an industrial plant in Wisconsin.

So, in the *Jones & Laughlin* case, this Court said, after referring to the large measure of success of the labor policy embodied in the Railway Labor Act:

"But with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!" 301 U. S. at p. 42. See, Rosenfarb, *op. cit. supra*, Ch. XIV.

What then are the conflicts between the Wisconsin Act and the Federal Act regulating interstate commerce?

(1) Conflict in declaration of public policy.

The Federal Act declares the public policy, with regard to labor relations, of the Federal government to be the encouragement of the practice and procedure of collective bargaining. The public policy set forth in Section 111.01 of the Wisconsin Act omits any positive declaration in favor of promoting collective bargaining. The Wisconsin Act provides that the activities of workers to induce fellow workers to join a union and bargain

collectively as equally wrongful as is the coercion exercised by an employer to prevent employees from self-organization and collective bargaining. Sec. 111.06 (2) (a) Wis. Act. (Appendix 55-56)

The Congressional committees which considered the Wagner-Connery Bill, which later became the National Labor Relations Act, expressly refused to include provisions against coercion of employees by employees or labor organizations. (*infra*, p. 39) +

The importance of the declaration of public policy to the effectuation of the purposes of the Federal Act cannot be underestimated. It has furnished a fundamental guide to the interpretation and enforcement of the Federal Act in each of its provisions.

The declaration of policy has served to establish the fundamental concept of the exercise of the interstate commerce power upon which the validity of the Act rests, *NLRB v. Jones & Laughlin, supra*; to define the limit of the exemption for agricultural employees, *North Whittier Heights Citrus Assn. v. NLRB*, 9 Cir., 109 F. (2d) 76, cert. den. 311 U. S. 72, 61 S. Ct. 54; to determine the extent of the remedial powers of the Board, *Republic Steel Corp. v. NLRB*, 311 U. S. 7, 61 S. Ct. 77; to define company-dominated labor organizations, *NLRB v. Newport News Ship Building & Drydock Co.*, 308 U. S. 241, 60 S. Ct. 246; to define the duty of bargaining collectively and reducing agreements to writing, *Heinz & Co. v. NLRB*, 311 U. S. 514, 61 S. Ct. 320; to ascertain the appropriate bargaining unit, *NLRB v. Pittsburgh Plate Glass Co.*, 313 U. S. 146, 61 S. Ct. 908; to define interference, restraint and coercion, *International Association of Machinists v. NLRB*, 311 U. S. 72, 61 S. Ct. 83; and to define discrimination in regard to employment, *Phelps-Dodge Corp. v. NLRB*, 313 U. S. 177, 61 S. Ct. 845.

Indeed, it can be said of the National Labor Relations Act, that its declaration of policy has perhaps been of more significance than in the case of any other legislation in recent times. There is hardly a case of any importance under the Act which has not leaned heavily upon the declaration of policy to reach its decision. Rosenfarb, *op. cit. supra* Ch. II, National Labor Relations Board, *Second Annual Report* (1937) p. 4. And the reason may well lie in the fundamental character of the legislation.

By its conflicting declaration of policy, the Wisconsin Act opposes the basic conception of the Federal Act. This conflict destroys even the harmony between the other provisions of the two acts which may be in substantial conformity, because it conditions the Wisconsin Act to a conflicting interpretation and enforcement. It makes the State Act a persistent obstacle in the way of a uniform national labor policy.

Hines v. Davidowitz, supra

Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715

(2) Conflict as to definition of a labor dispute.

Under Section 2.(3) of the Federal Act, a labor dispute is defined as including:

"... any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate regulation of employer and employee."

The Wisconsin Act, however, defines a labor dispute as meaning:

"... any controversy between an employer and the majority of his employees in a collective bar-

gaining unit concerning the right or process of details of collective bargaining or the designation of representatives. . . ." Sec. 111.02 (8) (*Italics added*) (Appendix 58)

It is an unfair labor practice for employees to strike unless a majority in the collective bargaining unit of the employees or an employer against whom said acts are directed have voted by a secret ballot to call a strike. Sec. 111.06 (2) (e) (Appendix 66)

This ruling has been confirmed by decision of Wisconsin Circuit Court in *W. E. R. B. v. Milk & Ice Cream Drivers Union*, decision by Circuit Court of Milwaukee County, August 1, 1940, affirming "Final Order" of the Wisconsin Board in *Golden Guernsey Dairy Cooperative v. Union*, reported in 3 CCH Labor Law Service, par. 60,049, affirmed on appeal, 229 N. W. 31.

Under the Federal Act, strikers, regardless of their majority status, are protected from employer unfair labor practices and retain their right as employees to vote for the bargaining agency. Under the State Act, these rights are terminated.

The conflict is sharply outlined by the ruling of this Court in the case of *Mackay Radio & Telegraph Co. v. NLRB.*, 304 U. S. 333, 58 S. Ct. 904, when this Court said:

"The strikers remained employees under Section 2 (3) of the Act, 29 U. S. C. Sec. 152 (3) which provides that 'the term employee shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute.' . . . Within this definition the strikers remained employees for the purpose of the Act and were protected against the unfair labor practices denounced by it." (304 U. S. at p. 345)

See, *Christian Lund v. Woodenware Workers' Union*, 19 F. Supp. 607.

And the Senate Report on the Federal Act stated:

"Recognition that strikers may retain their status as employees has frequently occurred in judicial decisions. To hold otherwise for the purposes of this bill would be to withdraw the government from the field at the very point where the process of collective bargaining has reached a critical stage and where the public interest has mounted to the highest point." (Sen. Rept. 573, 74th Cong., 1st Sess. p. 6.)

(3) Conflict as to rights of minority to bargain collectively.

Under the Federal Act, an employer has a legal privilege to bargain collectively with the representatives of a minority of his employees if at the time there is not a rival union representing the majority. *Consolidated Edison Company v. NLRB, supra*. Under the specific provisions of Section 111.06 (1) (e) of the Wisconsin Act, the employer is guilty of an unfair labor practice if he bargains collectively with the representatives of a minority of his employees, even though, at the time, there is no rival union representing the majority. (Appendix 64)

This express provision is repugnant to the rights recognized under the Federal Act of employees to engage in collective bargaining even though they do not constitute a majority, and the policy of the Federal Act to encourage collective bargaining. Rosenfarb, *op. cit. supra*, pp. 238-241.

(4) Conflict as to appropriate bargaining unit.

Under Section 9 (b) (c), Federal Act, Congress left to the National Labor Relations Board the duty to determine what, in any particular case, should be the appropriate bargaining unit for purposes of collective bargaining. (Appendix 67) The Board may, in its discre-

tion, determine whether the unit shall be the "employer unit, craft unit, plant unit, or bus division thereof." *American Federation of Labor v. NLRB*, 308 U. S. 401, 60 S. Ct. 300.

Section 111.02 (6), Wisconsin Act, provides that a collective bargaining unit means:

"all of the employees of one employer, except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered." (Appendix 58)

The difference between the provisions as to bargaining units is commented on by the Wisconsin Supreme Court in *Metropolitan Life Ins. Co. v. Wis. Labor Relations Board*, 237 Wis. 464, 297 N. W. 430, in considering changes in the 1939 Wisconsin Act from its 1937 predecessor, on this subject.

Thus, on the vital issue of the appropriate collective bargaining unit the two acts are repugnant. The State Act compels the establishment of craft units when desired by a majority in a craft without regard to any and all other circumstances.

In *Creamery Package Manufacturing Co.*, Case No. 348-E-117, June 23, 1941, reported in Vol. 8 L.R.R. p. 866, the State Board ruled that it may hold an election to determine bargaining representatives even though proceedings are pending before the Federal Board, and may, further, direct an election based on a bargaining unit other than the one set up by the Federal Board.

The State Board stated:

"Even though such right had not been waived, we would still hold, where no certification has been made by the National Labor Relations Board, prior

to the filing of the petition with the Wisconsin Board, that we not only have a right to order such an election but are bound to do so. . . .

"The fact that a subsequent election may be held by the National Labor Relations Board and that a different result may be obtained does not seem to us to be of any particular importance."

But, we submit, the matter is one of considerable importance, *Pittsburgh Plate Glass Co. v. NLRB, supra*. An impossible situation arises if the Federal Board establishes an industrial plant-wide collective bargaining unit and the State Board in the same plant establishes several craft bargaining units. Such a conflict could not possibly be reconciled and the procedure of collective bargaining would be obstructed by the conflicting bargaining units and proceedings. In the case of a company with integrated operations covering many states, a confusion of bargaining units would seriously tend to obstruct interstate commerce. *Jones & Laughlin case, supra*, 301 U. S. at pp. 25-27, 43.

Furthermore, in these days of national emergency, the policy of the Act to encourage collective bargaining will require the constant extension of collective bargaining on a national industry-wide scale.

See *Report of Commission on Industrial Relations in Great Britain* (1938) U. S. Dept. of Labor, p. 4.

Report of Commission on Industrial Relations in Sweden (1938) U. S. Dept. of Labor, p. 4.

The Wisconsin Act in its conflicting determination of the bargaining unit obstructs the development of a vitally important element in a national labor policy.

(5) Conflict over the unfair labor practices of employees and unions.

One of the major conflicts between the federal and state act rests in the effect of unfair labor practices on the part of employees and unions. The scheme of

the Wisconsin Act is that employees and unions may forfeit their rights to collective bargaining if they breach the public order of the State. So the Wisconsin Act in Section 111.06 (2) (a)—(j) inclusive, contains provisions defining so-called unfair labor practices by employees. (Appendix 65-66) The individual appellants were found to have violated these provisions. Similarly, the same practices may be charged to a labor organization, and the appellant union has been found guilty of violating these prohibitions. The Wisconsin Act does not, however, merely provide that employees and unions shall not engage in such practices. It goes further.

As to individuals who violate these provisions, it authorizes the termination of the employment relation by excluding them from the definition of employee. Section 111.02 (3) of the Act defines an employee as follows:

"The term 'employee' shall include any person other than an independent contractor, working for another for hire in the State of Wisconsin . . . who has not been found to have committed or to have been a party to any unfair labor practice hereunder. . . ." (Appendix 57)

Unions which commit unfair labor practices may be prohibited from acting as collective bargaining agents for a period up to one year. Section 111.07 (4) provides:

"Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the Board may deem proper." (Appendix 71)

The Wisconsin Act therefore uses the loss of collective bargaining rights as a penalty for the violation of local police laws.

On the other hand, the federal law has no such provisions at all. The effectuation of its policy requires directly conflicting regulations.

First. The Federal Act explicitly omitted any unfair labor practices by employees and unions in the regulation of collective bargaining. It was done so advisedly. The House Labor Committee in its report on the Federal Act stated:

"Objection is constantly made that the bill is limited to unfair labor practices by employers. It is contended that the bill should prohibit 'anyone (including, of course, an employee or labor organization) from interfering with, restraining or coercing employees in the exercise of these rights, and that without such provision, the bill is 'unfair' 'one-sided' and would lead to the domination of industry by organized labor. But is clear that corresponding to the right of employees to be free from interference, etc., by their employer in their organizational activities, is the right of the other party to the negotiations, the employer, to be free in his designation of representatives for that purpose. The Railway Labor Act contains such a reciprocal provision that neither employers nor employees shall in any way interfere with, influence or coerce the other in their choice of representatives (Sec. 3) but does not deal with organizational activities by employees or labor organizations. Such a reciprocal provision, forbidding employees to interfere with the right of employers to choose their own representatives for collective bargaining, would be a merely formal requirement, ignoring the realities of the situation. In the light of common knowledge, it can hardly be said that this right of employers needs protection under this bill. Organizations of employers in trade associations and in national organizations of such trade associations have blanketed the country; the integration of business into larger corporate units and the formation of such trade associations has not been stopped by the antitrust laws.

"Furthermore, a provision forbidding employees to interfere with the right of employers to choose their representatives would not satisfy the opponents of the bill. What is really sought is a legal strait-jacket upon labor organizations, on the specious theory that such organizations have no more legitimate concern in the organization of employees than have the employers themselves. But the bill seeks to redress an inequality of bargaining power by forbidding employers to interfere with the development of employee organization, thereby removing one of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees." (H. Rept. No. 1147, 74th Cong. 1st Sess. p. 16)

This Court has recognized the absence of any such provisions as a deliberate feature of congressional policy. In the *Jones & Laughlin* case, *supra*, it said:

"The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible. That it fails to provide a more comprehensive plan, with better assurance of fairness to both sides and with increased chances of success in bringing it about, if not compelling equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step', in dealing with the evils which are exhibited in activities within the range of legislative power. *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411; *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 227;

Miller v. Wilson, 236 U. S. 373, 384; *Sproles v. Binford*, 286 U. S. 374, 396. The question in such cases is whether the legislature in which it does prescribe, has gone beyond constitutional limits." (301 U. S. 1 at p. 46.)

And the rule is well established that-

"If Congress has a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provision made by it." (*Priggs v. Pennsylvania*, 16 Pet. 539.)

Second. Judicial decisions upholding rulings of the federal board have established that the employee status for purposes of collective bargaining continues regardless of minor acts of disorder.

One of the most fiercely argued issues in the administration of the Federal Act was this very question. In the case of *NLRB v. Stackpole Carbon Co.*, 105 F. (2d) 167, cert. den. 308 U. S. 605, 60, S. Ct. 142, the Third Circuit Court of Appeals said:

"We cannot conclude that rights given to employees under the National Labor Relations Act are destroyed because of violence of a type as common to labor disputes as a fist-fight upon a picket line." 105 F. (2d) at p. 176.

Similarly in the case of *Carlisle Lumber Co., v.*

NLRB, 99 F. (2d) 533, 540, the Ninth Circuit Court of Appeals, said:

"Respondent again contends that reinstatement and back pay should not be awarded because the men in question committed acts of violence and do not, therefore, have clean hands. We answered that contention in the prior decision by the statement that—'It is not the union but the Board which is seeking enforcement.' 94 F. (2d) 138, 146. What I have said regarding the purpose of the Act is also applicable here, and requires the conclusion that the penalty is not controlled by equity. See, also, *National Labor Relations Board v. Remington-Rand, Inc.* (CCA) 94 F. (2d) 862, 872; Senate Committee on Education and Labor, Report No. 595, 74th Congress, p. 15. . . . Since the Supreme Court has said that 'reinstatement of the employees and payment for time lost are requirements imposed for violation of the statute' (*Jones & Laughlin v. Labor Board*, 301 U. S. 1, 48). It would seem that we should consider such orders in the nature of penalties and free from the application of the equitable defense suggested.

In the *Republic Steel* case, 107 F. (2d) 472, affirming 9 NLRB 219, except for modifications in other respects, 311 U. S. 7, 61 Sup. Ct. 77, the policy was explained as follows:

"In the *Fansteel* case the Court was dealing with a case which involved a sit-down strike in which the strikers forcibly and unlawfully deprived their employer of possession of his plant. The Court made it clear that unlawful conduct of that character deprived the participant of the right of reinstatement. We think it must be conceded, however, that some disorder is unfortunately quite usual in any extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth

hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory. We accordingly recently held that it was not intended by the Act that minor disorders of this nature should deprive a striker of the possibility of reinstatement. *National Labor Relations Board v. Stackpole Carbon Co.*, supra." 107 F. (2d) at p. 479

The same problem arises with regard to unions under the two acts. In *NLRB v. Remington-Rand, Inc.*, 2 Cir., 94 F. (2d) 862, 873, the Court stated:

"Though the union may have misconducted itself, it has a locus poenitentiae. If it offers in good faith to treat, then the employer may not refuse because of its past sins."

In *Kuehne Mfg. Co.* case, 7 NLRB 304, the Federal Board stated:

"The Act imposes an unconditional duty upon the employer to bargain collectively with representatives designated by a majority of his employees in an appropriate bargaining unit. If we assume that the strikers interfered with the movement of respondent's property, their misconduct, for which appropriate remedies exist under State laws, does not justify respondent in ignoring Federal law by its refusal to bargain collectively with the Union." 7 NLRB at p. 321

But under the Wisconsin Act, a union whose members have been found guilty of minor acts of misconduct may forfeit its status as collective bargaining representative,

though it has been duly selected as the majority representative under the provisions of the Federal Act.

The case of *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490, does not protect the Wisconsin Act. On the contrary, the *Fansteel* case shows the relation between the Federal Act and the State Act. The Federal Board order in the *Fansteel* case was invalid because, according to the decision of this Court, it impaired the preservation of local order to promote collective bargaining.

So this Court said:

"We repeat that the fundamental policy of the act is to safeguard the rights of the self-organization and collective bargaining and thus, by the promotion of industrial peace, to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees rights." (306 U. S. at p. 257)

See *The Fansteel Case, Employee Misconduct and Remedial Powers of the NLRB*, 52 Harv. L. Rev. 1275.

On the same principle, though in the opposite way, the Wisconsin Act is invalid because it violates collective bargaining in order to protect public order. To paraphrase the *Fansteel* holding, the State Act encourages the resort to industrial strife obstructing interstate commerce by destroying collective bargaining relations, and this cannot be deemed any part of the purpose of the state police power.

The conflicts between the two acts boil down to one essential point: the policy of the Federal Act is to require perfected collective bargaining for the breach of its provisions; whereas the policy of the State Act is to require the forfeiture of collective bargaining rights as a penalty for the breach of its provisions. Where the Federal Act requires employers who have committed unfair labor practices to cease and desist therefrom and to accept collective bargaining through freely chosen representatives of their employees, the State Act requires, as a penalty, employees who have violated local police laws to forego collective bargaining privileges and rights.

We do not see how the state can so undermine federal collective bargaining rights any more than it could require a forfeiture of the rights of employees to social security benefits, or to the protection of the Wage-Hour law, the Public Contracts Act, or the Railway Labor Act.

The Wisconsin Employment Peace Act stands as an obstacle to the effectuation of the policies of the Federal Act.

III.

The Order of the Wisconsin Employment Relations Board, Upheld by the State Courts, Is Beyond the Constitutional Jurisdiction of the State Board.

When the State Board took jurisdiction of this case, despite the objections of the appellant, it assumed to deal with matters that were the subject of the exercise of constitutional powers by Congress. The State Act authorized the Board to deprive the individual appellants of their employee status for the purposes of collective bargaining. It authorized the Board to deprive the Union of its capacity to act as an exclusive collective bargaining representative for a period up to one year.

The company's complaint prayed among other things that the individuals guilty of unfair labor practices be declared no longer employees of the Company as defined in Section 111.02 (3) (b) of the Wisconsin statutes. (R. 31)

Moreover, in its answer to the appellants petition for review of the State Board's Final Order, the Company alleged that these individuals were no longer its employees. (R. 23)

The State Board did find that the individual appellants had committed unfair labor practices and issued a cease and desist order against them. It is clear that under its own theory at the time, it considered that these individuals thereby forfeited their employee status, and became subject to the loss of statutory protection from employer unfair labor practices. They also thereby forfeited their right to participate in the determination of a collective bargaining agency.

The Wisconsin Supreme Court in *Hotel and R. E. I. Alliance v. Wis.*, 236 Wis. 329, 295, N. W. 634, had ruled that by engaging in a strike where the majority had not by secret ballot previously voted in favor of such strike, all strikers thereby became strangers to the employer for purposes of the Wisconsin Act. The Court stated:

"By engaging in an unauthorized strike, an employee may lose his status as an employee. He then has the same rights and is subject to the same liabilities as a third person. When he thus withdraws from his employment, he is free to speak, but his right to coerce his former employer is limited by the act." 236 Wis. p. 351.

This judgment was rendered in a case wherein the Wisconsin Employment Relations Board had found as conclusions of law that:

"All of the former employees of the Plankinton House Company who went out on strike and who

remained out on strike, have been parties to an unfair labor practice, by cooperating and engaging in a strike without first obtaining the approval of a majority of such employees." 236 Wis. at p. 335.

The Wisconsin Board, in an explanatory statement accompanying its decision in that case stated:

"Before going on strike, no vote by secret ballot authorizing the strike was taken among the employees of the hotel. This, under Chapter III of the Wisconsin Statutes, is clearly an unfair labor practice, and all of the employees taking part in such strike are necessarily parties to such unfair practice. The result to the employees, under Section 111.02 (3) of the Wisconsin Statutes, is that such employees have lost their status and are no longer employees of the Plankinton House Company. To many this result may seem to be a harsh penalty, but it is a result that flows naturally from this law, and is something which this Board as an administrative board, has nothing to do with. Here the unions took the position that Chapter III of the Wisconsin Statutes did not apply to them, that they might have a closed shop contract without complying with the provisions of this law or the award of the board of arbitration. We feel that the unions and the employees involved, in taking this position, were entirely wrong, and that as a result of the position they have taken, and particularly their failure to comply with the requirement that a vote be taken before striking, has resulted in the loss of their status as employees." (*In re Plankinton House Co.*, 5 L.R.R. Manual 650, 651, 652)

To avoid what seemed to it to be a clear challenge to the constitutionality of the Wisconsin Act, the State Supreme Court in this case, reversed its previous decision and the theory of the State Board, and held that, notwithstanding the fairly explicit language of the State

Act, a finding of the State Board of unfair labor practices by employees does not exclude them from the definition of employees, without an express order by the State Board to that effect. (R. 51-52)

But the Wisconsin Supreme Court does not deny the power of the State Board to make such an order, in this case, and under the Wisconsin Act. On the contrary, it expressly affirms that power as discretionary in the State Board. Nor does it deny the State Board the power to discourage collective bargaining by depriving the Union under the State Act of its capacity to represent its members for the purposes of collective bargaining. The opinion of the State Court leaves intact the conflicting provisions of public policy, definitions of labor dispute, of appropriate bargaining unit and of employee.

Despite the construction given to it, the State Act still stands as an obstacle to the effectuation of the federal policy expressed in the National Labor Relations Act and related legislation. Under the circumstances of this case, therefore, the State Board lacked jurisdiction to entertain the original complaint of the company. *Thornhill v. Alabama*, 310 U. S. 88, 97, 60 S. Ct. 736, 741; *Carlson v. California*, 310 U. S. 106, 112, 60 S. Ct. 746, 749.

IV.

The Wisconsin Employment Peace Act Is an Unconstitutional Exercise of the Police Power of the State.

The principal contention advanced in support of the decision below is that the State Act is a regulation of labor relations, under the police power of the State, exercised in an area which is not covered by the Federal Act. We believe, however, that we have shown that the State Act invades the control embodied in the Federal

Act over obstructions to interstate commerce due to industrial disputes.

We think the validity of the entire State Act is raised in these proceedings, since it was under the basic provisions of the entire Act that the proceedings before the State Board were originally instituted. While the final order issued by the State Board relates only to unfair labor practices of employees and labor organizations, nevertheless the challenge here is to the jurisdiction of the Board because the statute in its entirety and on its face is unconstitutional.

The rule has often been stated that when a legislative enactment has an all-pervading purpose coupled with minor details and administrative features, and this purpose is unconstitutional, such minor details and administrative features cannot survive condemnation of the same purpose.

Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453.

Dorchy v. Kansas, 264 U. S. 286, 47 S. Ct. 86.

Employers Liability Cases, 207 U. S. 463, 28 S. Ct. 141.

State v. Dammann, 228 Wisc. 147, 280 N. W. 698.

State v. Sande, 205 Wisc. 495, 238 N. W. 504.

Water Power Cases, 148 Wisc. 124, 134 N. W. 330.

Cooley, (8th Ed.) *Constitutional Limitations*, p. 362.

In *Employers' Liability Cases*, *supra*, the Court stated:

"The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to

the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois Central Railroad v. McKendree*, 203 U. S. 514 and authorities there cited." 207 U. S. at p. 501.

In *Dorchy v. Kansas*, *supra*, the Court stated:

"A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. *Berea College v. Ky.*, 211 U. S. 45, 54-56; *Carey v. S. Dakota*, 250 U. S. 118, 121; 39 S. Ct. 403; 63 L. ed. 886. But a provision inherently unobjectionable cannot be deemed separable unless it appears both that standing alone, legal effect can be given to it, and that the legislature intended the provision to stand in case others included in the act and held bad should fall." 264 U. S. at p. 289.

It may be urged that Section 111.16 of the Wisconsin Act saves the legislation for purposes of the Final Order as issued against the union. (Appendix 80) We do not believe that the severability clause in this section can sustain any portion of the Wisconsin Act because its all pervading purpose and provisions regarding labor relations is unconstitutional. In *State v. Dammann*, *supra*, the Wisconsin Court considered the effect of a severability clause similar in its language to the clause in the Wisconsin Act. The Court stated:

"This clause is very broad and is entitled to great weight as an indication of legislative intent in determining whether the unobjectionable portions of the act can stand. The clause, of course, is not conclusive, and if so little of the act remains as not to leave a 'living, complete law capable of being carried into effect "consistent with the intention of the legislature which enacted it in connection with the void part"' it is the duty of the court to decline to sustain the act in part in spite of a separability clause. *State ex rel. Reynolds v. Sande*, 205 Wis. 495, 503, 238 N. W. 504, 507; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209; *Water Power Cases*, 148 Wis. 124, 134 N. W. 330." 228 Wis. at p. 198, 280 N. W. at p. 716.

The Final Order issued by the Board must be based on a valid enactment. The State Act is an integrated and indivisible plan of regulation of the subject of labor relations. It would be wholly illogical to declare that even though the State Act as applied to interstate commerce is invalid so far as it deals with the labor relations and collective bargaining, it is nevertheless valid for the purpose of issuing the restraining order against the Union in this particular case.

We submit that a decision against the constitutionality of the State Act will not prevent the proper exercise of the police power of a state to regulate the many aspects of the employment relation affecting the good order and peace of the state or the security of its citizens. As we have stated above, there is nothing in such a decision to prevent Wisconsin from using criminal and civil remedies and penalties to prevent the use of force or violence in labor disputes. See *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 61 S. Ct. 552.

Nor, indeed, is there anything to prevent a state from seeking new adjustments and trying experimentation in the development of peaceful labor relations, upon two

basic conditions: **first**, that it does not abridge constitutional liberties, *Carlson v. California, supra*; *Thornhill v. Alabama, supra*; *Wolff v. Kansas Industrial Relations Board*, 262 U. S. 522, 43 S. Ct. 630; *American Federation of Labor v. Bain*, 31 Ore. Adv. 87, 106 P. (2d) 544; **second**, that it does not impair the fundamental elements of the national policy in support of collective bargaining embodied in federal legislation, *Hague v. CIO*, 307 U. S. 496, 60 S. Ct. 337; *Hines v. Davidowitz, supra*; *Consolidated Edison Co. v. NLRB, supra*; *NLRB v. Jones & Laughlin, supra*.

The Federal Act does no more than affirm the fundamental rights which make up a national labor policy. Once the practices and procedures of collective bargaining are fully accepted there yet remains a great area of problems of industrial relations and victory production for national defense that may be susceptible to proper regulation and direction by the states. We have yet to devise measures for increasing cooperation between management and labor under governmental encouragement to promote the full use of our resources. It is time to put an end to the struggle over the essential principles of collective bargaining and turn to the vital problems of production which the practices of collective bargaining may help to solve.

To labor, that is the essential contemporary significance of the federal labor policy set forth in the National Labor Relations Act and related federal legislation. We have offered a number of concrete proposals to promote efficient industrial production of military and civilian articles in sufficient quantities and on time. We have offered these proposals both for the present emergency and for the purpose of dealing with foreseeable post-war economic and social conditions. See Testimony of James B. Carey, Secretary of the CIO, on

Post-Defense Planning, Hearings before Subcommittee of Senate Committee on Education and Labor on S. 1617, S. 1833, S. Res. 178, 77th Cong., 1st Sess., pp. 79-82, which includes the text of the CIO Industry Council Plan.

We insist that the federal labor policy must be the foundation for any state legislation. We cannot go backwards. The States may not, in the name of the police power or of their right to social experimentation, undermine or challenge the foundation erected by federal law. That is what Wisconsin has tried to do in its state labor relations act. We do not see how it is possible to develop a sound national labor policy if the States are permitted to destroy the practices and procedures of collective bargaining in labor relations affecting interstate commerce protected by federal law.

CONCLUSION

It is respectfully submitted that this Court should reverse the judgment of the Wisconsin Supreme Court upholding a judgment of the circuit court for Milwaukee County, enforcing the Order of the Wisconsin Employment Relations Board against the appellants and denying the petition of the appellants to set aside said Order.

Respectfully submitted,

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APPENDIX

This Appendix presents, in parallel columns, the texts of the National Labor Relations Act and the Wisconsin Employment Peace Act.*

NATIONAL LABOR RELATIONS ACT (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Secs. 151-166.)

FINDINGS AND POLICY

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and

WISCONSIN EMPLOYMENT PEACE ACT, c. 111 of Wisconsin Statutes, as enacted by c. 57, laws of 1939.

DECLARATION OF POLICY

Sec. 111.01. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

It is also recognized that what-

* The italicized heading at the top of each column on the succeeding pages shows the last section of each Act printed on each page. Sec. 111.09 of the State Act has been taken out of its order and placed in the column next to Section 6 of the Federal Act, Sec. 111.04 next to Sec. 7, and Sec. 111.05 next to Sec. 9.

Federal Act, Sec. 2 (1)

by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. When used in this Act

Person

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

State Act, Sec. 111.02 (1)

ever may be the rights of disputants with respect to each other, in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation of coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

DEFINITIONS

Sec. 111.02. When used in this chapter:

Person

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers.

*Federal Act, Sec. 2 (5)***Employer**

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Employee

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Representatives

(4) The term "representatives" includes any individual or labor organization.

Labor Organization

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

*State Act, Sec. 111.02 (3)***Employer**

(2) The term "employer" means a person who engages the services of an employee, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

Employee

(3) The term "employee" shall include any person, other than an independent contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another

*Federal Act, Sec. 2 (10)***Commerce**

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Affecting Commerce

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Unfair Labor Practice

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

Labor Dispute

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

National Labor Relations Board

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

State Act, Sec. 111.02 (7)

engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to Federal Railway Labor Act.

Representative

(4) The term "representative" includes any person chosen by an employee to represent him.

Collective Bargaining

(5) "Collective bargaining" is the negotiating by an employer and a majority of his employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

Collective Bargaining Unit

(6) The term "collective bargaining unit" shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do.

Unfair Labor Practice

(7) The term "unfair labor practice" means any unfair labor

*Federal Act, Sec. 2 (11)***Old Board**

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President of June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 [113] approved June 14, 1935. [July 5, 1935, c. 372, § 2, 49 Stat. 450; 29 U. S. Code, Sec. 152.]

State Act, Sec. 111.02 (12)

practice as defined in section 111.06.

Labor Dispute

(8) The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute.

All Union Agreement

(9) The term "all union agreement" shall mean an agreement between an employer and the representative of his employees in a collective bargaining unit whereby all of the employees in such unit are required to be members of a single labor organization.

Board

(10) The term "Board" means the Wisconsin Employment Relations Board, as created by section 111.03.

Election

(11) The term "election" shall mean a proceeding in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives or for any other purpose specified in this chapter and shall include elections conducted by the Board, or, unless the context clearly indicates otherwise, by any tribunal having competent jurisdiction or whose jurisdiction was accepted by the parties.

Secondary Boycott

(12) The term "secondary boycott" shall include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, whether by (a) withholding patronage, la-

*Federal Act, Sec. 3 (c)***NATIONAL LABOR RELATIONS BOARD**

Sec. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

Quorum

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

Report

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail

State Act, Sec. 111.03

bor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use or work on particular materials, equipment or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another.

EMPLOYMENT RELATIONS BOARD

Sec. 111.03. There is hereby created a Board to be known as Wisconsin Employment Relations Board, which shall be composed of three members, who shall be appointed by the governor by and with the consent of the senate. No appointee at the time of the creation of the Board shall serve on said Board without first having been confirmed by the senate. The term of office of the members first to be appointed shall be two, four and six years respectively, but their successors shall be appointed for terms of six years each, except that any individual appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The governor shall designate one member to serve as chairman of the Board. Each member of the Board shall take and file the official oath. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board and two members of the Board shall constitute a quorum. The Board shall have a seal for the authentication of its orders and proceedings, upon which shall be inscribed the words "Wisconsin Employment Relations Board—Seal." Each member of the Board shall be eligible for reappointment and shall not engage in any other business, vocation or employment. The Board may employ, promote and

Federal Act, Sec. 4(b)

the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SALARIES AND PERSONNEL

Sec. 4. (a) Each member of the Board shall receive a salary of \$10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

**Expiration of Old Board—
Transfer of Records**

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall

State Act, Sec. 111.03

remove a secretary, deputies, clerks, stenographers and other assistants, and examiners, fix their compensation and assign them to their duties, consistent with the provisions of this chapter. The Board shall maintain its office at Madison and shall be provided by the director of purchases with suitable rooms, necessary furniture, stationery, books, periodicals, maps and other necessary supplies. The Board may hold sessions at any place within the state when the convenience of the Board and the parties so requires. At the close of each fiscal year the Board shall make a written report to the governor of such facts as it may deem essential to describe its activities, including the cases it has heard, its disposition of the same, and the names, duties and salaries of its officers and employees. A single member of the Board is hereinafter in this chapter referred to as a commissioner.

Federal Act, Sec. 6 (a)

cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

Expenses of the Board

(c) All of the expenses of the Board, including all necessary traveling and subsistence, expenses outside of the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

**PRINCIPAL OFFICE—
INQUIRIES**

Sec. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

RULES AND REGULATIONS

Sec. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such

State Act, Sec. 111.Dv

RULES AND REGULATIONS

Sec. 111.09. The Board may adopt reasonable and proper rules and regulations relative to the

Federal Act, Sec. 8 (3)

rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

UNFAIR LABOR PRACTICES

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C. Supp. VII, title 15, secs. 701-712), as amended from

State Act, Sec. 111.06 (1) (c)

exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings. Such rules and regulations shall not be effective until ten days after their publication in the official state paper.

RIGHTS OF EMPLOYEES

Sec. 111.04. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities.

UNFAIR LABOR PRACTICES

Sec. 111.06. (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce his employees in the exercise of the rights guaranteed in section 111.04.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, provided that an employer shall not be prohibited from reimbursing employees at their prevailing wage rate for time spent conferring with him, nor from cooperating with representatives of at least a majority of his employees in a collective bargaining unit, at their request, by permitting employee organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company.

(c) To encourage or discourage

Federal Act, Sec. 8 (5)

time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

State Act, Sec. 111.06 (1) (g)

membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where three-quarters or more of the employees in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Board. The Board shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer, and each such all-union agreement shall be made subject to this duty of the Board. Any person interested may come before the Board as provided in section 111.07 and ask the performance of this duty.

(d) To refuse to bargain collectively with the representative of a majority of his employees in any collective bargaining unit; provided, however, that where an employer files with the Board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the Board.

(e) To bargain collectively with the representatives of less than a majority of his employees in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1) (c) of this section.

(g) To refuse or fail to recog-

State Act, Sec. 111.06 (2) (a)

nize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

(h) To discharge or otherwise discriminate against an employee because he has filed charges or given information or testimony in good faith under the provisions of this chapter.

(i) To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable at the end of any year of its life by the employee giving at least thirty days written notice of such termination.

(j) To employ any person to spy upon employees or their representatives respecting their exercise of any right created or approved by this chapter.

(k) To make, circulate or cause to be circulated a blacklist as described in section 343.682.

(l) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

Employee's Unfair Labor Practices

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

*Next Federal section
is Sec. 9(a) at p. 67*

State Act, Sec. 110.06 (2) (g)

(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

(c) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(d) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employees or their representatives accepted.

(e) To cooperate in engaging in, promoting or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use or disposition of materials, equipment or services; or to combine or conspire to hinder

*Next Federal section
is Sec. 9(a) at p. 67*

Federal Act, Sec. 9 (a)**REPRESENTATIVES AND ELECTIONS**

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

State Act, Sec. 111.05 (1)

or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

(i) To fail to give the notice of intention to strike provided in section 111.11.

(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.

REPRESENTATIVES AND ELECTIONS

Sec. 111.05. (1) Representatives chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining; provided that any individual employee or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall

Collective Bargaining Unit

(b) The Board shall decide in each case whether in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Investigations—Certification of Representatives—Secret Ballots

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Records in Case of Petition for Enforcement or Review

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in Section 111.02, (6), it shall be determined by secret ballot, and the Board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employees in a collective bargaining unit the Board shall determine the representatives thereof by taking a secret ballot of employees and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employee or group of employees participating in the election, except that the Board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The Board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.06 for review of orders of the Board.

(4) Questions concerning the determination of collective bargaining units or representation of employees may be raised by petition of any employee or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

Complaints—Procedure

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint

prompt action, the Board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employees, provided that it appears to the Board that sufficient reason therefor exists.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 111.07. (1) Any controversy concerning unfair labor practices may be submitted to the Board in the manner and with the effect provided in this chapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

Complaints—Procedure

(2) Upon the filing with the Board by any party in interest of a complaint in writing, on a form provided by the Board, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application. The Board may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the Board at any time prior to the issuance of a final order based thereon. The person or persons so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and

Federal Act, Sec. 10 (c)

and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

Findings of Fact—Orders

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

State Act, 111.07 (2)

give testimony at the place and time fixed in the notice of hearing. The Board shall fix a time for the hearing on such complaint, which will be not less than ten nor more than forty days after the filing of such complaint, and notice shall be given to each party interested by service on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. In case a party in interest is located without the state and has no known post office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the Secretary of State and shall also be sent by registered mail to the last known post office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon a party located within this state. Such hearing may be adjourned from time to time in the discretion of the Board and hearings may be held at such places as the Board shall designate.

Subpoenas

The Board shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by section 101.21. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture under the laws of the State of Wisconsin; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of

*Federal Act, Sec. 10 (e)***Modification and Setting Aside of Orders**

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Board-Petitions to Federal Courts

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or

State Act, Sec. 111.07 (3)

any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Board in obedience to a subpoena issued by it; provided, that an individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall willfully and unlawfully fail or neglect to appear or to testify or to produce books, papers and records as required, shall, upon application to a circuit court, be ordered to appear before the Board, there to testify or produce evidence if so ordered, and failure to obey such order of the court may be punished by the court as a contempt thereof.

Each witness who shall appear before the Board by its order or subpoena shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record; which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the chairman of the Board and charged to the proper appropriation for the Board.

Hearings Before Board

(3) A full and complete record shall be kept of all proceedings had before the Board, and all testimony and proceedings shall be taken down by the reporter appointed by the Board. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

Federal Act, Sec. 10 (c)

in part, the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

*State Act, Sec. 111.07 (5)***Findings of Fact**

(4) After the final hearing the Board shall promptly make and file its findings of fact upon all of the issues involved in the controversy; and its order, which shall state its determination as to the rights of the parties. Pending the final determination by it of any controversy before it the Board may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the Board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order.

(5) The Board may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the Board as a body to review the findings or order. If no petition is filed within twenty days from the date that a copy of the finding or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the Board as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by

*Federal Act, Sec. 10 (g)***Petition for Review by an Aggrieved Party**

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

Effect of Court Proceedings on Orders of the Board

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the

State Act, Sec. 111.07. (7)

the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the Board shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within ten days after the filing of such petition with the Board, the Board shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the Board is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another twenty days for filing a petition with the Board.

(6) The Board shall have the power to remove or transfer the proceedings pending before a commissioner or examiner. It may also, on its own motion, set aside, modify or change any order, findings or award (whether made by an individual commissioner, an examiner, or by the Board as a body) at any time within twenty days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence.

Board Petitions to State Courts

(7) If any person fails or neglects to obey an order of the Board while the same is in effect the Board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for

Federal Act, Sec. 11 (1)

- court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes" approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

Hearings

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

Subpoenas—Administration of Oaths

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency

State Act, Sec. 111.07 (7)

appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the Board. Upon such filing the Board shall cause notice thereof to be served upon such person by mailing a copy to his last known post office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing before said court upon such record by the Board serving ten days written notice upon the respondent; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the Board and enter an appropriate decree. No objection that has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive. The court may, in its discretion, grant leave to adduce additional evidence where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the Board. The Board may modify its findings as to the facts, or make new findings by reason of such additional evidence, and it shall file such modified or new findings with the same effect as its original findings and shall file its recommendations, if any, for

Federal Act, Sec. 11 (3)

conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

Enforcement of Subpoenas in the District Courts

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony, touching the matter under investigation or in question; and at any failure to obey such order of the court may be punished by said court as a contempt thereof.

Obedience to Subpoenas Required

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject

State Act, 111.07 (8)

the modification or setting aside of its original order.

The court's judgment and decree shall be final except that the same shall be subject to review by the Supreme Court in the same manner as provided in section 102.25.

Petition for Review by an Aggrieved Party

(8) Within thirty days from the date of the order of the Board as a body any party aggrieved thereby may petition the circuit court for the county in which he or any party resides or transacts business for review of the same; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Where different parties in the same proceeding file petitions for review in two or more courts having proper jurisdiction, the jurisdiction of the court first petitioned shall be exclusive and the other petitions shall be transferred to it. Such petition shall state the grounds upon which a review is sought, and shall be served with the summons. Service upon the Secretary of the Board or any member of the Board shall be deemed completed service on all parties, but there shall be left with the person so served as many copies of the summons and complaint as there are respondents, and the Board shall mail one such copy to each respondent. If the circuit court is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of the findings or order, it may extend the time another thirty days in which such action may be commenced. The Board shall thereupon file in the said court its record in the proceedings, as provided in the next preceding subsection. Such re-

Federal Act, Sec. 11 (5)

him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination; to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Method of Service of Papers and Process

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Service on Defendant in Judicial Districts

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the

State Act, 111.07 (13)

turn of the Board, when filed in the office of the clerk of the circuit court, shall constitute a judgment roll in such action, and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' written notice to the other. Upon such hearing the court may confirm, modify or set aside the order of the Board and enter an appropriate decree. Except as specifically provided otherwise herein the proceedings shall be the same as provided for in subsection (7) of this section.

(9) In any proceedings for review of an order of the Board the court shall disregard any irregularity or error unless it be made to appear affirmatively that the complaining party was prejudiced thereby.

(10) Commencement of proceedings under subsections (7) or (8) of this section shall, unless otherwise specifically ordered by the court, operate as a stay of the Board's order.

(11) Petitions filed under this section shall have preference over any civil cause of a different nature pending in the circuit court, shall be heard expeditiously, and the circuit courts shall always be deemed open for the trial thereof.

(12) A substantial compliance with the procedure of this chapter shall be sufficient to give effect to the orders of the Board, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

(13) A transcribed copy of the evidence and proceedings or any part thereof on any hearing taken by the stenographer appointed by

Federal Act, Sec. 11 (6)

defendant or other person required to be served resides, or may be found.

Use of Records and Information Possessed by Other Governmental Agencies

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession, relating to any matter before the Board.

State Act, Sec. 111.10

the Board, being certified by such stenographer to be a true and correct transcript, carefully compared by him with his original notes, and to be a correct statement of such evidence and proceedings, shall be received in evidence with the same effect as if such reporter were present and testified to the fact so certified. A copy of such transcript shall be furnished on demand free of cost to any party (all of the members of a single organization being considered a single party).

(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

FINANCIAL REPORTS TO EMPLOYEES

Sec. 111.08. Every person acting as the representative of employees for collective bargaining shall keep an adequate record of its financial transactions and shall present annually to each member within sixty days after the end of its fiscal year a detailed written financial report thereof in the form of a balance sheet and an operating statement. In the event of failure of compliance with this section, any member may petition the Board for an order compelling such compliance. An order of the Board on such petition shall be enforceable in the same manner as other orders of the Board under this chapter.

ARBITRATION

Sec. 111.10. Parties to a labor dispute may agree in writing to have the Board act or name arbitrators in all or any part of such dispute, and thereupon the Board shall have the power so to act. The Board shall appoint as arbitrators only competent, impartial and disinterested persons.

Proceedings in any such arbitration shall be as provided in Chapter 298 of the statutes.

MEDIATION

Sec. 111.11. The Board shall have power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It shall be the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the Board shall have any power of compulsion in mediation proceedings. The Board shall provide necessary expenses for such mediators as it may appoint, order reasonable compensation not exceeding ten dollars per day for each such mediator, and prescribe reasonable rules of procedure for such mediators.

Where the exercise of the right to strike by employees of any employer engaged in the State of Wisconsin in the production, harvesting or initial processing (the latter after leaving the farm) of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employees shall give to the Board at least ten days notice of their intention to strike and the Board shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the Board shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the Board shall endeavor to induce the parties to arbitrate the controversy.

Next Federal section
is Sec. 12 at p. 79

*Federal Act, Sec. 13***INTERFERENCE WITH
BOARD MEMBERS OR
AGENTS**

Sec. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

Sec. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

*State Act, Sec. 111.15***DUTIES OF THE ATTORNEY
GENERAL AND DISTRICT
ATTORNEYS**

Sec. 111.12. Upon the request of the Board, the Attorney General or the district attorney of the county in which a proceeding is brought before the circuit court for the purpose of enforcing or reviewing an order of the Board shall appear and act as counsel for the Board in such proceeding and in any proceeding to review the action of the circuit court affirming, modifying or reversing such order.

**EMPLOYER AND EMPLOYEE
COMMITTEES**

Sec. 111.13. The Board may, from time to time, appoint joint standing or special committees composed in equal numbers of representatives of employees and employers. The Board may refer to any such committee for its study and advice any matters having to do with the relations of employers and employees or the operation of this chapter.

PENALTY

Sec. 111.14. Any person who shall willfully assault, resist, prevent, impede or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this chapter shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than one year, or both.

**CONSTRUCTION OF THIS
CHAPTER**

Sec. 111.15. Except as specifically provided in this chapter, nothing herein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything

Federal Act, Sec. 15

State Act, Sec. 111.18

in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employee of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes.

**EXISTING CONTRACTS
UNAFFECTED**

Sec. 111.16. Nothing in this chapter shall operate to abrogate, annul, or modify any valid agreement respecting employment relations existing on the effective date hereof.

**CONFLICT WITH OTHER
ACTS**

Sec. 111.17. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this chapter, this chapter shall prevail, provided that in any situation where the provisions of this chapter cannot be validly enforced the provisions of such other statutes or laws shall apply.

**CONFLICTS WITH OTHER
ACTS**

Sec. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (1) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (1) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: Provided, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEPARABILITY

Sec. 15. If any provision of this Act, or the application of such provision to any person or cir-

SEPARABILITY

Sec. 111.18. If any provision of this chapter or the application of such provision to any person or

Federal Act, Sec. 16

cumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SHORT TITLE

Sec. 16. This Act may be cited as the "National Labor Relations Act."

State Act, Sec. 111.19

circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

SHORT TITLE

Sec. 111.19. This chapter may be cited as the "Employment Peace Act."



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CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 252.

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL,
RADIO AND MACHINE WORKERS OF AMERICA, et al.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and
ALLEN-BRADLEY COMPANY,

Respondents.

REPLY BRIEF.

LEE PRESSMAN,
JOSEPH KOVNER,
ANTHONY WAYNE SMITH,
MAX GELINE,

Attorneys for Appellants.

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IN THE
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Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and
ALLEN-BRADLEY COMPANY,
Respondents.

REPLY BRIEF.

The importance of the issues raised in this case is so great that we consider it essential to reply to some of the major assertions in respondents' briefs which, we believe, are inaccurate and fallacious.

I.

Respondents Err in the Contention That No Issue Was Raised in Proceedings Before the State Board and State Courts That Congress Had Pre-empted the Subject Covered by the National Act.

In the proceedings before the Wisconsin Board, appellants filed objections to jurisdiction on the grounds that

the National Act is exclusive and paramount (R. p. 32). In the formal answer, appellants alleged that the Wisconsin Board has no jurisdiction to proceed in the matter and is unconstitutional because it illegally interferes with interstate commerce. Orally (R. p. 35), objection to jurisdiction was made on the grounds that in part the National Act is exclusive and paramount with respect to matters of collective bargaining.

In the Circuit Court, the issue of pre-emption was raised in paragraph 21 (R. p. 9), wherein appellants alleged:

“That Congress in enacting the National Labor Relations Act has pre-empted the subject covered by said National Labor Relations Act in the exercise of its powers to regulate interstate commerce, and that the State is without any present authority or jurisdiction to regulate in any manner the same general subject as covered by the National Act.”

The respondents filed answers denying the foregoing allegation. The Wisconsin Court, in its decision, stated that the issue of pre-emption was raised in Case (R. p. 41), and decided the issue adversely to appellants. No extended argument on this issue was made in the Wisconsin Supreme Court because it had decided this question in **Fred Rueping Leather Company v. Wisconsin Employment Relations Board**, 228 Wis. 175. It was deemed futile to urge that the Wisconsin Court reverse its decision in the Rueping case.

Appellants specifically stated that it was only for purposes of the appeal to the State Supreme Court that the issue of pre-emption would not be argued.

II.

Appellants Need Not Establish That Personal and Property Rights Are Violated in Order to Raise Constitutional Issues.

Board counsel contend that since the National Act confers no private right or remedy, no constitutional rights of appellants under the National Act can be invalidated by the Wisconsin Act. (Board Brief, p. 17). The right of a party to raise constitutional issues is not so narrowly limited.

The union and appellants are members of the class of employees and labor organizations for whose specific benefit the National Act was adopted. If the State Act, in fact, is unconstitutional as applied to appellants, they, as members of the class, are entitled to raise the question of constitutionality. The Wisconsin Act was applied to appellants by assumption of jurisdiction and proceedings conducted by the Wisconsin Board enforcing the State Act. Appellants have been prejudiced by attempt to enforce State Act against them. They have been wrongly included within the terms of the Act (*Citizens National Bank v. Kentucky*, 217 U. S. 443, 542 L. Ed. 832, 30 S. Ct. 532).

Furthermore, appellants have the right to complain against the specific order issued if, in fact, the Act, under the authority of which the order was issued, is void and unconstitutional because of the National Act. To determine the jurisdiction of the State Board to issue any order under the State Act, it becomes necessary to determine whether the State Board has jurisdiction concurrently with the National Board to enforce a labor relations law covering the same field as the National Act.

If, in fact, the State Act is an integrated and indivisible plan of regulation of the subject of labor relations and is unconstitutional, then the order issued is void and uncon-

stitutional because it was made in the exercise of a jurisdiction that does not exist. An unconstitutional act is no law. **Buchanan v. Warley**, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16. It confers no right; it imposes no duty; it affords no protection; it is in legal contemplation as inoperative as though it has never existed. **Morton v. Shelby Co.**, 118 U. S. 425, 442, 6 S. Ct. 1125; **Bonnett v. Vallier**, 136 Wis. 193.

It therefore becomes necessary for this Court to determine whether the final order, regardless of its substance, is based on a valid law in so far as it was issued by a board claiming the right to exercise jurisdiction over the same subject of labor relations of employers engaged in interstate commerce and subject to the National Act.

III.

Wisconsin Court, as Do Respondents, Erred in Claim That Pre-emption by National Act in the Field of Collective Bargaining Would Constitute a License to Employees in Wisconsin to Commit Acts of Violence in Labor Disputes. The Police Power of the State to Punish or Restrain Lawless Acts Would Remain Unimpaired if Wisconsin Act as Applied to Interstate Commerce is Held Unconstitutional.

It is repeatedly urged in respondent's brief that the states would be shorn of all police power to maintain law and order if this Court rule that the National Act has pre-empted the field. The respondents urge further that such ruling would undermine the very essentials of the relations between the state and federal governments. Such ruling would have no effect as feared. Congress, in the National Act, has sought to remedy evils to interstate commerce which the states had not theretofore regulated in exercise of police power. It was only after the National Act was passed that several states subsequently enacted

state labor relations acts patterned along similar lines. The power which the states had previous to the enactment of the National Act to punish for wrongful acts committed in the course of a labor dispute still exists.

Committee reports and statement of Senator Wagner, cited in respondent's brief, expose the fallacy of this contention. The state criminal and civil laws against lawless acts of employees are valid and enforceable, even though the Wisconsin Act is unconstitutional. As a matter of fact, the procedure and requirements of the Wisconsin Act make it utterly unfeasible as a means of maintaining law and order in strike situations. The orders of the Wisconsin Board are enforceable only after confirmation by Circuit Court. 111.07 (7), Wisconsin Act. From ten to forty days notice of hearing must be given to adverse party after complaint is filed. 111.07 (2), Wisconsin Act. If the Board's order is not obeyed, it must petition Circuit Court for enforcement decree and give at least ten days' notice of hearing to adverse party. 111.07 (7), Wisconsin Act. After the Circuit Court has confirmed the order it may still be reversed by appeal to the Wisconsin Supreme Court. Sec. 111.07 (7).

A more cumbersome means of dealing with lawless conduct in strikes is hardly conceivable. As a matter of fact, employers have available the right to injunctive relief under Section 103.51—103.68, Wisconsin Statutes, which is the Wisconsin equivalent of the Norris-La Guardia Act. The right to protection from lawless conduct in labor disputes by injunctive relief in a court of equity is as available if the Wisconsin Act is held unconstitutional as it is presently, because the federal act does not cover the subject. We submit that the extreme concern for the police power of the state is unnecessary, because it is not jeopardized.

IV.

Decisions of Wisconsin Board Refute Claim That Wisconsin Act Supplements and Promotes Purposes of National Act. State Action Is as Obstructive to Accomplishment of Federal Purposes as Were Rival Independent National Boards Established Under the N. I. R. A.

Respondents urge that grant of exclusive authority to the National Board was intended to prevent other national boards from acting in the field, but not to exclude states. At the time the national act was enacted there were no state laws regulating collective bargaining. Further, there were no state labor relations acts at the time, but there were numerous federal labor boards seeking to regulate approximately the same subject. The failure of the act to specifically prohibit the states from regulating the subject was quite unnecessary, particularly in view of the supremacy of federal regulation in the interest of protecting interstate commerce.

The fact that exclusive authority was given to the National Board over other national boards dealing with labor relations would indicate that the Congress would have prohibited rival state boards, if any existed, from performing the same functions. There is no logical reason why a state board should retain authority to regulate the subject of labor relations covered by the national act any more than national labor boards of particular industries which were established under the N. I. R. A. It was hardly necessary for Congress to anticipate that some states might assert rival concurrent jurisdiction.

Practically all of the states except Wisconsin have provisions therein prohibiting jurisdiction of state boards in cases subject to the national act (Appellant's Brief, pp. 29-30).

The need for an exclusive supreme agency is indicated further in the statement quoted from Senator Robert F. Wagner on page 36 of Board's brief. The evils which Senator Wagner refers to in this quote are precisely the evils which have grown up as the result of the concurrent jurisdiction of the Wisconsin Board. In support of this statement we refer to the following cases which were considered by the Wisconsin Board in enforcement of its act, which demonstrates that the exercise of concurrent jurisdiction by the State Board is an intolerable obstacle to the accomplishment of the full purposes and objectives of Congress in enacting the federal act. We cite the following decisions of the Wisconsin Board because of the bald assertion of counsel for the Board that the Wisconsin act "aids in the accomplishment of federal purposes" (Board's Brief, p. 99).

(A) The Allen-Bradley Company filed its complaint against the appellant union and its members on or about May 30, 1939 (R. 28-31). Appellant union filed charges of unfair labor practices against respondent in the Twelfth Regional Office of the National Board on July 1, 1939. The hearing conducted by the Wisconsin Board lasted approximately two weeks. The purpose of this hearing was to enforce the provisions of the Wisconsin act.

The company sought to have the employees who had committed employee unfair labor practices be declared no longer employees of the company as defined in section 111.02 (3) (b). Under the authority given to the Wisconsin Board by Section 111.07 (4), Wis. Act, the union had every reason to expect that it would suspend the exclusive bargaining agency rights of the union because it and all of its members violated some of the provisions of section 111.06 (2) and (3). The failure of the Wisconsin Board to punish appellant union by terminating its bargaining rights for up to a year amounted to an unwillingness of

the Board to enforce the state act. The existence of this authority is contrary to Congressional intent as expressed in the national act, under which the appellant union could not be deprived of its bargaining rights so long as it represented the majority of the employees, even though it committed the acts set forth in the interlocutory and final order of the Board (Appellant's Brief p. 43). Furthermore, the State Board found that all of the members of the union who had engaged in unfair labor practices by mass picketing, etc., had committed unfair labor practices during the course of the strike, and could have terminated their statutory rights to protection from employer unfair labor practices. That they found only fourteen to have committed such acts does not eliminate the essential fact that on the record they could have terminated statutory benefits and protection which the national act intended should continue without any question.

Based on the charges, and investigation made by its agents, the National Board authorized the issuance of a complaint against the Allen-Bradley Company, charging unfair labor practices in violation of Sections 8 (3) and 8 (5), Nat. Act. While these proceedings were pending before the National Board the company filed a petition to have an election for the purpose of determining the bargaining agency for employees of the company.

At the hearing objection was made to the proceedings on the grounds that the State Board was without jurisdiction, and further that proceedings were pending before the National Board charging the company with unfair labor practices, and that the Board had authorized issuance of a complaint against the company. The petition of the Allen-Bradley Company was filed with the Wisconsin Board on or about September 7, 1940, as case number II 213-E-48. Hearing was held on September 24, 1940. One of the exhibits introduced then was a letter addressed

to Max E. Geline from John G. Schott, then Regional Director of the Twelfth Regional Office, which stated as follows:

"September 24, 1940

Mr, Max E. Geline
Attorney-at-Law
Empire Building
Milwaukee, Wisconsin

Re: Allen-Bradley Co. XII-C-473

Dear Mr. Geline:

This is in reply to your inquiry about the status of Case No. XII-C-473, in the Matter of Allen-Bradley Company and Local 1111, United Electrical, Radio and Machine Workers of America, based upon a Charge dated July 1, 1939, and an Amended Charge dated September 30, 1939.

These Charges have been investigated by this office, pursuant to the Rules and Regulations of the Board, and a report has been made to the Board upon the results of such investigation. The Board has since directed me to issue a Complaint in this case, alleging violations of Section 8, sub-sections (1), (3), and (5) of the National Labor Relations Act, and I have requested the Acting Regional Attorney of this office to draft a Complaint and Notice of Hearing, in accordance with the Board's direction, as soon as the legal schedule in this office permits.

Very truly yours,

John G. Schott,
Regional Director.

Despite the pendency of these National Board proceedings, the Wisconsin Board ordered and directed that an election be held to determine the bargaining agency of employees of said company. Case No. II 213-E-48; Decision No. 121, dated October 7, 1940.

We reprint in Appendix hereto part of the Memorandum accompanying the order and direction of election because it sets forth significantly the impropriety of concurrent jurisdiction by the Wisconsin Board.

The election was conducted by the State Board on October 30, 1940. Of the 560 individuals who were eligible to vote, the total ballots cast numbered 526—292 voted in favor of the union and 226 voted against it.

If the ballots cast had resulted in a majority of votes against having Local 1111 act as bargaining agency, under Section 111.06 (1) (e), Wis. Act, the employer would commit an unfair labor practice by bargaining with Local 1111, either as exclusive bargaining agency or for its members, even though at that time the union was recognized by the National Board as exclusive bargaining agency, with which the company was duty bound to bargain.

Contrary to the assertions made by counsel for the Board, the Wisconsin Board has in numerous decisions ruled that it would be an unfair labor practice for an employer to bargain collectively in any manner with a union representing less than a majority. We call this Court's attention to the statement of Board's counsel on page 96 commenting on the meaning of section 111.06 (1) (e):

"Hence, when Sec. 111.06 (1) (e) prohibits collective bargaining with the representatives of less than a majority of the employees in a collective bargaining unit, what said section does is merely to prohibit the making of a contract with a minority union with respect to wages, hours and working conditions for all employees in the bargaining unit. There is no difference between the National Act and the State Act in this regard.—The Board has never considered Sec. 111.06 (1) (e), when read in connection with Sec. 111.02 (5), to prohibit a minority union from bargaining with respect to wages, hours and working conditions with respect to its members only. The Board has

applied the State Act exactly as the National Act was applied by this Court in Consolidated Edison Co. v. National L. R. Bd. (1938), 305 U. S. 197.”

Counsel had apparently overlooked some of the decisions of the Wisconsin Board, wherein it held that an employer would be guilty of an unfair labor practice if he bargain collectively with representatives of a minority, and a union representing a minority is guilty of an unfair labor practice if it seeks to bargain collectively.

We cite the statement of the Wisconsin Board in Case III, No. 464 E-161, Decision No. 324, in the Matter of the Petition of Furniture Manufacturers, Inc., for determination of bargaining representatives, decision rendered on November 3, 1941, wherein the Wisconsin Board ordered an election on November 31, 1941.

In this case the Union objected in part to proceedings by the Board instituted on petition of the employer on the grounds that a rival petition was filed by it with the National Board. In its memorandum attached to the order of election the State Board stated:

“Unless an employer is satisfied by some evidence produced by the Union, that such Union actually represents a majority of the employes for which the Union is attempting to bargain collectively, the employer is guilty of an unfair labor practice in bargaining collectively with such organization, and with the Union itself. . . . Under Chapter 111 of the Wisconsin Statutes, an employer is bound to bargain collectively with the representative of a majority of its employes, and can be compelled to do so by this Board. Under that Chapter, an employer is given the right to request this Board to conduct an election to determine whether or not the representative claiming to represent a majority, actually does represent such majority. Notwithstanding the fact that this company is engaged in interstate commerce, and comes within the

terms and under the jurisdiction of the National Labor Relations Act, it is engaged in business in Wisconsin, and is subject to the laws of this State. Before any unfair labor practice charge, alleging failure to bargain in good faith, could be filed against this employer, there would have to be a determination that the Union actually represented a majority of the employees, and under Section 111.06 (1) (d), such employer cannot be deemed to have refused to bargain until an election has been held and the result certified to him by the Board. We have, for that reason, ordered this election."

Under the rules of the National Board, the employer in the two cases above cited would not be permitted to file petitions to determine representations, as no rival organizations claiming to represent a majority were involved in the controversy. Article III, Secs. 1, 2 and 3, Rules and Regulations, N. L. R. B., Series 2, July 11, 1939, N. L. R. B.

In **Morris Resnick, Inc., and Quality Packing Company v. Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., Local No. 248**, Case No. 1, No. 473 Cw-47, Decision No. 334, the employer complained that the Union which at the time did not represent a majority of the employees attempted to intimidate and compel the employer to sign an all-union agreement in violation of Section 111.06 (1) (c), Wis. Act. The Wisconsin Board ruled that the employers involved had no right to enter into a contract demanded by the Union, and that no legal labor dispute existed between the Union and the employer under the Wisconsin Act. The Wisconsin Board further found that the Union was guilty of unfair labor practices in that they have done the following acts prohibited by Sub-section 2 of Section 111.06 of the Wisconsin Statutes:

"A. In violation of Section 111.06 (2) (b) coerced, intimidated and attempted to induce complainants to interfere with their employees in the enjoyment of their

legal rights, including those guaranteed in Section 111.04 of the Wisconsin Statutes, and coerced, intimidated and attempted to induce complainants to engage in practices with regard to their employees which would constitute unfair labor practices, if undertaken by complainants, of complainants' own volition, as follows:

“(b) To bargain collectively with representatives of less than a majority of the employees in a collective bargaining unit of complainants, contrary to the provisions of Section 111.06 (1) (e), Wisconsin Statutes.”

As an order based on the foregoing findings of fact and conclusions of law, the Wisconsin Board ordered the union and its members to cease and desist, among other matters, from:

“(c) Attempting to induce complainants or either of them to bargain collectively with Local No. 248 unless and until said Local No. 248 has been duly designated by the majority of the employees of a collective bargaining unit of said complainants as their exclusive bargaining agent.”

The order of the State Board denying the union the right to bargain collectively in any way with the company under the Wisconsin Statutes is contrary to the permissible rights of employees under the national act to self-organization and collective bargaining, as set forth in **Consolidated Edison Co. v. N. L. R. B.**, 305 U. S. 197. Furthermore, the dispute is a legal dispute under Sec. 2 (9), National Act.

Returning to the question of the possible consequences if the union had lost the election in the Allen-Bradley case, the company would be duty bound to refuse to bargain collectively with the Union, even though at the same time it was guilty of unfair labor practices for failure to bargain collectively under the national act. In this con-

nection we cite the decision of this Court in **N. L. R. B. v. P. Lorillard Co.**, decided Jan. 5, 1942, ... U. S. ..., 86 L. ed., p. 358, wherein this Court upheld the order of the National Board directing that the company involved bargain collectively, even though the local union, because of employer unfair labor practices, might no longer represent a majority of the employees. The order of the United States Circuit Court of Appeals modifying an order of the National Board, by directing the Board to conduct an election to determine whether the local had lost its majority to a rival independent association, was reversed by this Court. This Court stated:

"The Board had considered the effect of a possible shift in membership alleged to have occurred subsequent to Lorillard's unfair labor practices, but it had reached the conclusion that in order to effectuate the policies of the Act Lorillard must remedy the effect of its prior unlawful refusal to bargain collectively with the union shown to have a majority on the date of Lorillard's refusal to bargain. This was for the Board to determine and the court below was in error in modifying the Board's order in this respect." 86 L. ed., at 359.

The Wisconsin Board, in ordering the election at the Allen-Bradley Company under the circumstances then existing, in effect accomplished exactly what the Circuit Court of Appeals sought to accomplish by directing the election. The National Board itself would not permit the conduct of an election at a time when a complaint was pending against the employer charging him with unfair labor practices. An election under such circumstances would be improper and unfair, until the effects of the employer's unfair labor practices had been dissipated.

In its Fourth Annual Report the National Labor Relations Board declared:

"The Board also attempts to hold an election at a time when the balloting will accurately reflect the untrammelled desires of the employees. Consequently, if the Board has found that the employer has engaged in unfair labor practices, it usually postpones the election until some future time after its decision, when the effects of the unfair labor practices will have been dissipated; but the Board will, in such cases, when requested to do so by all the parties involved, direct that an election be held forthwith" (p. 77).

What would the duty of the Allen-Bradley Company be if the union lost the election conducted by the Wisconsin Board? If it bargained with the union, it would be guilty of violating Sec. 111.06 (1) (e); if it fails to bargain with the union it violates Sec. 8 (5) of the National Act.

One of the principle criteria for determining conflict between State and Federal Acts is stated as follows in **Southern R. Co. v. Reid**, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140:

"Acts of Congress and state laws are in conflict when, if one obeys the state laws he incurs the penalties of the federal laws, and if he obeys the federal law he incurs the penalties of the state laws."

In a decision of the Wisconsin Board in **Lakeside Bridge & Steel Company v. Int. Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 471 et al.**, Case II, No. 256, Cw-32, Decision No. 147, the employer complained that the union attempted to force the company to bargain collectively with it. A strike was called by the union to enforce collective bargaining. After setting forth various facts, the Wisconsin Board as conclusions of law found that the employer had no right or duty to recognize the union as the collective bargaining agent of its production employees; and that the union committed unfair

labor practices by attempting to coerce it into bargaining collectively at a time when it represented less than a majority.

As its order, the Wisconsin Board directed the union to cease and desist from:

“(d) attempting to induce Lakeside Bridge & Steel Company to bargain collectively with Local 471, unless and until Local 471 has been duly designated by a majority of the production employees of Lakeside Bridge & Steel Company as the exclusive bargaining agent of all production employees of Lakeside Bridge & Steel Company;

“(e) attempting to induce Lakeside Bridge & Steel Company by any means whatsoever to agree to specific terms in a collective bargaining contract, the performance of which terms by Lakeside Bridge & Steel Company would be an unfair labor practice by Lakeside Bridge & Steel Company under Chapter 111 of the Wisconsin Statutes.”

The foregoing decision, to which others could be added, establish the drastic manner in which the enforcement of the Wisconsin Act as to parties engaged in interstate commerce nullifies and obstructs the full accomplishment of the purposes of Congress in enactment of the National Labor Relations Act.

It cannot be assumed that the National Board is incapable of coping with the labor relations problems subject to its jurisdiction. The foregoing decisions of the State Board indicate the serious problem which the National Board has in enforcing the National Act in the face of the existing concurrent jurisdiction of the State Board, and the deprivation of the right of employees and labor organizations, guaranteed by the National Act.

As further evidence of the impracticality of having concurrent jurisdiction, we refer to the rival proceedings of

the State and National Boards which took place at the Rock River Woolen Mills in Janesville, Wisconsin. This company manufactures automobile cloth for the automotive industry and employs approximately 230 people. It is subject to the National Act. The Textile Workers' Union of America filed a petition for investigation and certification of representatives on July 6, 1939, in **Rock River Woolen Mills, Case No. 124-204**. A stipulation was entered into between the company and the union for conduct of an election on October 15, 1939. The union refused to consent to the election as agreed upon for various reasons. Upon the refusal an employee of the Rock River Woolen Mills filed a petition to determine representatives with the Wisconsin Board on October 14, 1939.

The Wisconsin Board ordered a hearing for October 18th, and thereafter, by decision dated October 30, 1939, directed an election to be held to determine the bargaining agency among production employees. Objection was filed to its jurisdiction. Prior to rendering its decision the Wisconsin Board was advised that the N. L. R. B. had scheduled a hearing in Janesville, Wisconsin, for November 4, 1939. The Wisconsin Board conducted its election on November 3, 1939. The election resulted in 116 votes in favor of the union and 129 against. The union itself did not participate in the conduct of the election.

Thereafter the company refused to engage in collective bargaining with the Union **for its members** for the reason that under Section 111.06 (1) (e), Wisconsin Act, it would be an unfair labor practice for the employer to engage in such collective bargaining relations.

The National Board conducted a hearing on November 6th and by decision dated December 28, 1939, ordered and directed that an election be held. Volume 18, N. L. R. B. Reports 828. The Textile Workers' Union lost the National Board election, 107 to 129. However, under the

National Act, no legal impediment exists to continuing collective bargaining by the Textile Workers' Union for and on behalf of its members only. The Wisconsin Act prohibits such bargaining. This is another actual case in which the State Act has obstructed the accomplishment and execution of the full purposes of the National Act.

Another case demonstrating the potential and actual obstruction to fulfillment of federal purposes is the decision in the **Matter of the Petition of Sewing Machine Mechanics Association of America for Determination of Bargaining Representatives for Employees of the Phoenix Hosiery Company**, Case I, No. 177 E-39. The Phoenix Hosiery Company is a corporation having its principal offices in Milwaukee and employing approximately 2,300 persons in the manufacturing of full fashioned and seamless hosiery. This company is subject to the National Act.

This company had in effect two closed shop agreements with the American Federation of Hosiery Workers. One such contract was entered into between the Full Fashioned Hosiery Manufacturers of America, Inc., representing approximately 40 manufacturers and covering about 40,000 employees on a nation-wide basis, including the full-fashioned employees of the Phoenix Hosiery Company. This contract was to continue for a period of three years up to and including August 31, 1941. Another contract covering the seamless workers continued in effect until August 31, 1941. The Sewing Machine Fixers Association, an independent union, filed a petition with the National Board to have itself set up as bargaining representative of five sewing machine fixers employed in both the full fashioned and seamless departments of the company.

This petition was withdrawn by the Association with

consent of the National Board and thereafter another petition was filed with the Wisconsin Board in 1940. At a hearing on August 21, 1940, the American Federation of Hosiery Workers objected to the jurisdiction of the Wisconsin Board on the grounds that the labor relations of the employer are subject exclusively to the jurisdiction of the National Board, and further objected to the proceedings on the grounds of the existing collective bargaining agreement aforementioned. The Wisconsin Board in dismissing the petition nevertheless declared in its memorandum accompanying this decision that:

"We recognized that the underlying purpose of the Employment Peace Act is to put into the hands of individual employees engaged in a particular craft, division, department, or plant, the right to determine for themselves whether they desire such craft, division, department or plant set-up as a separate unit, or not, and will not hesitate in any case in which it appears that an employer and a union with which it has a collective bargaining agreement providing for an automatic renewal of such agreement, to order an election at such time as such agreement may be expiring, where the company is notified prior to the termination date that employees in a certain craft, division, department or plant, desire to constitute themselves a separate bargaining unit, and select a new bargaining representative to carry on negotiations for them." Decision of the Wisconsin Board, Case I, No. 177 E-39, Decision No. 115.

The foregoing quotation reveals that the Wisconsin Board considers itself entitled to set up bargaining units based on crafts, regardless of what the history of collective bargaining may be in the particular industry.

The National Act establishes the authority and discretion in the National Board to decide in any particular case what the appropriate unit should be for collective bargaining. Section 9 (b), National Act. Also, **American**

Federation of Labor v. N. L. R. B., 308 U. S. 401, 60 S. Ct. 300, 84 L. ed. 347.

The provisions of the State Act defining appropriate bargaining units are obviously repugnant to the intent of Congress that only the National Labor Relations Board should exercise the authority to set up bargaining units. Increasingly collective bargaining, particularly during the emergency of war-time economy, is based on national arrangements between representatives of industry and the representatives of organized workers in the industry.

The utmost confusion is possible if a small number of vitally important craft workers can claim the right to bargain separately on the basis of the rules contained in the Wisconsin Act. The State Act makes it mandatory to set up craft bargaining units, regardless of how detrimental such separate units may be to the procedure of collective bargaining for the employer, or in the industry. This divided authority to determine bargaining units in industries engaged in interstate commerce in Wisconsin is potentially able to cause much controversy and with destructive consequences resulting from rival claims of statutory authority to bargain for the same employees. It would be practically impossible to include the Phoenix Hosiery Company in a national collective bargaining agreement covering all other manufacturers if the Wisconsin Board sets up separate units such as were requested by the Sewing Machine Mechanics Association in this case.

In the Matter of the International Union of Operating Engineers, Local No. 311, and The Heil Company, Milwaukee, Wisconsin, Case I, No. 303 E-78 R-64, Decision No. 185, the petitioning union requested the State Board to set up a bargaining unit for one of the company's plants. The evidence established that the company is engaged in interstate commerce, and objection was taken to the State Board's jurisdiction, because at the time of

hearing a petition had been filed with the National Board. The State Board held that its orders are enforceable until such time as the National Board enters an order in conflict with the order previously made by the State Board.

The Board further held that a collective bargaining agreement with the Steel Workers' Organizing Committee, which covered these employees, would not bar an election requested by a craft group. The Board stated:

"An employer and a union cannot enter into such a contract as will in the future prevent employees from selecting a different bargaining representative or a new collective bargaining unit." P. 2, Memo. accompanying Order of Dismissal.

The Board further stated:

"We have in all cases submitted to us for decision attempted to construe this Section of the Statutes in as liberal a manner as possible to the end that small groups employed in separate divisions, departments or plants might have the benefits of collective bargaining with their employer even though the vast majority of the employees of such an employer did not, for some reason or another, desire to avail themselves of such privilege." Ibid.

The claim of authority of the Wisconsin Board to nullify industrial unit collective bargaining contracts at the request of minorities obviously makes labor relations based on existing industrial unit contracts untenable in the State of Wisconsin. This obviously is repugnant to the Federal policies and intention of Congress that the National Board determine what shall be the appropriate bargaining unit in a particular case.

Under Section 2 (9), National Act, defining labor disputes, employees are entitled to maintenance of their status in the course of a strike whether or not they have a secret

ballot and whether or not they constitute a majority or minority of the employees.

Under Section 13, National Act, the right to strike is unaffected by provisions of the act. Under the State Act the Board has asserted the right to conduct an election itself where necessary to determine the majority wishes of striking employees. The legality of the strike and the further right to maintenance of statutory employee status is made dependent on the maintenance of a majority status even during the strike. See **Allis-Chalmers Manufacturing Co. v. Allis-Chalmers Workers Union, Local 248**, Case VI, No. 312, Decision No. 186, wherein the State Board ordered an election during strike to determine the desires of the majority of the employees.

The foregoing actual cases, to which many more could be added, make abundantly evident that the only way in which Federal purposes and policies can be accomplished is by nullifying the claim of the Wisconsin Board to jurisdiction over cases involving interstate commerce.

V.

Wisconsin Court Erred as to Appellants in Construing National Act as Applicable to Parties Only to the Extent That an Order is Issued in a Particular Controversy.

The Wisconsin Court found it necessary in arriving at its decision to construe the applicability of the National Act to employment relations in the State of Wisconsin. In its construction the Court declared that the National Act is "applied" as to particular parties only to the extent that an order is issued in a particular case.

"Both from the language of the Act and the construction which has been placed upon it by the Wisconsin Supreme Court it is apparent that the Act operates effectively in a particular case only in the

way and to the extent which is determined by the orders of the National Labor Relations Board" (T. p. 47).

Further, the Wisconsin Court stated:

"The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts, but is one of jurisdiction between the State and Federal Governments. Inasmuch as the National Labor Relations Act depends for its effective operation upon the determination of the National Labor Relations Board, there can be no conflict between the acts until they are applied to the same labor dispute" (T. p. 48).

Further, in its decision the Court declared:

"In this case the employer has never been charged with an unfair labor practice, nor has the National Labor Relations Board ever been requested to determine who is the proper bargaining representative. Consequently, the National Labor Relations Act has never been applied to the labor dispute here under consideration and it may never be applied, depending upon the exercise of the discretion of the National Labor Relations Board. Therefore, there can be no conflict of jurisdiction between State and Federal authority in this case" (pp. 48-49).

The foregoing statements make it appear as if the National Act is merely a directive instrument addressed to the National Board which promulgates the law as to particular parties in the terms and provisions of its orders. The Board, under the foregoing construction, possesses legislative powers.

Under the foregoing construction, there is no National Labor Relations Act applicable to employers until and unless there is an order issued by the National Board and until and unless there is some actual obstruction to inter-

state commerce. The application of the law is made discretionary with the Board. This construction of the National Act is erroneous. Respondents, as does the Wisconsin Court, confuse the remedial authority given to the National Board with the law-making power which can only be exercised by Congress. Such construction would clearly invalidate the Act. **Schechter Poultry Corp. v. U. S.** 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947. **Carter v. Carter Coal Co.**, 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

This Court, in **N. L. R. B. v. Jones & Laughlin S. Corp.** 301 U. S., at 33, stated:

"Thus in its present 'application' the Statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer." 301 U. S., at 33.

All of the measures which the Board is permitted to take in enforcing the act "relate to the protection of the employees and the redress of their grievances, not to redress of any supposed public injury, after the employees have been made secure in their right of collective bargaining and have been made whole." **Republic Steel Corp. v. N. L. R. B.**, 311 U. S. 7, 85 L. ed. 6. The power of the Board to command affirmative action is remedial. **Rep. Steel Corp. v. N. L. R. B.**, supra; **Consolidated Edison Co. v. N. L. R. B.**, 305 U. S. 197, 235, 236, 83 L. ed. 126, 143, 144, 59 S. Ct. 206; **N. L. R. B. v. Penn. Greyhound Lines, Inc.**, 301 U. S. 261, 267, 268, 82 L. ed. 831, 58 S. Ct. 571, 115 A. L. R. 397.

If the Wisconsin Court had properly construed the National Act so that it applied as to employers and employees engaged in interstate commerce, it would then have been

compelled to test the jurisdiction of the State Board by determining whether the State and National Acts may consistently stand together. Although erroneously decided, the Wisconsin Court was compelled to rule on the question of concurrent jurisdiction in order to reach its decision in the case. It decided a federal question. Therefore, this Court, of necessity, must rule on the same federal question.

VI.

Respondents Err in Contention That Decision Holding State Act Unconstitutional as to Interstate Commerce Would Invalidate All Other State Regulations Covering Employers and Employees.

Counsel contend that many fields of state regulation of employer-employee relations would be withdrawn from state regulation if the Wisconsin Employment Peace Act were held unconstitutional as applied to interstate commerce. See Company brief, pages 15-19, and the Board's brief, page 40.

No such consequence could possibly result because the fields of unemployment insurance, workmen's compensation, etc., are clearly not within the field of regulation covered by the National Act. As such they have nothing to do with protection of employee rights to self-organization and collective bargaining and could by no conceivable stretch of the imagination be included in that field.

Reference is made to Section 103.51 of the Wisconsin Act. This section of the statute is in no way connected with the act dealing with labor relations as such, but was intended to curb and restrict the unfair use of the injunctive power by courts as means of interfering with the exercise of the rights of labor to strike and picket. See Frankfurter and Greene, The Labor Injunction.

Counsel often repeated that Congress had not regu-

lated the field of labor relations and that at the time of the enactment the power of Congress to deal with the subject was questionable. The review in the Jones & Laughlin decision of the history of federal regulation of labor relations in the enforcement of the Sherman Anti-Trust Act and in the railroads establish that this assertion is erroneous. That somebody may have thought that the authority under the Commerce clause was doubtful is irrelevant in view of the decisions sustaining the national act.

The Congressional treatment of the subject of labor relations and collective bargaining is based on the exercise of the commerce powers. This power is as paramount in the regulation of the subject of labor relations, because of their effect on interstate commerce, as would be the regulations of the railroads or employment relations under the Railroad Labor Act. The states may not enforce a workmen's compensation act as to railway workers subject to the Employers' Liability Act. See **New York Central Railroad Co. v. Winfield**, 244 U. S. 147, holding a state law permitting recovery of compensation without regard to negligence of employees invalid as applied to railway workers, where the Federal Employers' Liability Act required proof of negligence.

Counsel repeatedly urge that the national act is limited. This is undoubtedly true as to the extent to which Congress intended to prohibit employer unfair labor practices (it could have included many other subjects) and in its refusal to include employee and union unfair labor practices as part of the plan of regulation. In their briefs they refer to the statements of Senator Wagner and the committee reports which establish the Congressional intention was to omit regulations prohibiting pressure by one employee upon another for the purpose of having such employee join a union and bargain collectively. In view of the concrete evidence of Congressional intent, the contentions

of respondents, that the Wisconsin act deals with a field not contemplated by Congress is erroneous. See *New York Central Railroad Co. v. Winfield*, 244 U. S. 147 (Allen-Bradley Brief p. 27).

VII.

This Court Will Consider Constitutional Issues Necessary to Decision of Case.

This Court has held that where a federal ground is present it is incumbent upon this Court, when it is urged that the decision of the state court rests on a nonfederal ground, to decide for itself, in order that constitutional liberties may appropriately be enforced, whether the asserted nonfederal ground independently and adequately supports the judgment. *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 699.

In *Leathe v. Thomas*, 207 U. S. 93, 99, 52 L. ed. 119-120, Justice Holmes declared:

"Of course, there might be cases where, although the decision be for other reasons, it would be apparent that a federal question was involved whether mentioned or not. It may be imagined for the sake of argument that it might appear that a state court, if ostensibly deciding the federal question in favor of the plaintiff in error, rightly must have been against him, and was seeking to evade the jurisdiction of this Court. The ground of decision did not appear and that which did not involve a federal question was so palpably unfounded that it could not be presumed to have been entertained, then it may be that this Court would take jurisdiction. *Johnson v. Risk*, 137 U. S. 300, 207."

In *Burgess v. Seligman*, 107 U. S. 20, this Court stated:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate

with, and not subordinate to; that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws." 107 U. S. 20, at 33.

A statute must be tested not by what has been done under it, but by what it authorizes to be done under its provisions. **Central National Bank of Topeka, Kansas, v. McFarland**, 20 Fed. (2nd) 416, Cert. Denied, 278 U. S. 606, 49 S. Ct. 12, 73 L. ed. 533.

In **Gregg Dyeing Company v. Query**, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A. L. R. 831, this Court stated:

"In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of the taxing scheme, or upon the characterization of it by the state courts. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State. **St. Louis S. W. R. Co. v. Arkansas**, 235 U. S. 350, 362, 59 L. ed 265, 271, 35 S. Ct. 99; **Hanover F. Ins. Co. v. Harding**, 272 U. S. 494, 509, 519. . . ."

The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution.

"Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinction and real injuries. **Schaffer v. Carter**, 252 U. S. 37, 55, 64 L. ed. 445, 457, 40 S. Ct. 221."

The statute must be judged by its natural and reasonable effect. **Colon v. New Hampshire**, 171 U. S. 30, 33, 34. The validity of a statute is to be tested by consideration

of the general principles, application to the questions and by the examination of the terms of the act, and what it authorizes, and not by what has been done and probably will be done under it. **State v. Hall**, 178 Wis. 172, 190 N. W. 457; 16 C. J. S., Constit. Law, Par. 97.

Under the foregoing rules the question for this Court first to determine is the object and purpose of the statute, its practical operation and its natural and reasonable effect on the statutory plan of regulation embodied in the National Act.

An independent consideration of the meaning of section 111.02 (3) (b) as applied to the final order will, we believe, show conclusively that the final order as issued was intended by the Board, and, under the State Act, resulted in the loss of employee status for purposes of collective bargaining of the fourteen appellants.

The Wisconsin Court, in ruling that the fourteen appellants were still employees of the company, nevertheless did not rule that they were employees for all purposes of the Wisconsin Act. To reach its decision it omitted the most vital section of the Wisconsin Act on which the loss of status of the appellants was based, namely, the section of the definition of "employee" whereby subdivision (b) is made referable to strikers only.

The respondent company conceded that the fourteen appellants, under the Board's ruling, suffered loss of protection from discriminatory discharge and loss of the right to be treated as employees for any of the purposes of the Wisconsin Act. The Wisconsin Board's counsel in their brief stated that striking employees who have committed unfair labor practices are apparently not entitled to be treated as employees for purposes of administering the act in relation to that particular controversy (a current

labor dispute). The Wisconsin Act is not reasonably susceptible of two interpretations. This Court has often stated:

“When a statute is reasonably susceptible of two interpretations, we have preferred the meaning that preserves to the meaning that destroys. . . . But avoidance of the difficulty will not be pressed to the point of disingenuous evasion.” *Hopkins Fed. Savings & Loan Assoc. v. Cleary*, 292 U. S. 315, 80 L. ed. 251. # *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 77 L. ed. 1265, 535 S. Ct. 620. #

. This Court, if satisfied that the State Act is not susceptible of two interpretations, is not required to accept the construction of the State Act where the construction appears to be unreasonable, improper and contrary to the express language of the statute.

Although the state court had ruled that the employee relationship was not terminated—a contention never made by appellants—it did not specifically rule that the employee status for purposes of the State Act was not in any way terminated or impaired by the Board’s finding them guilty of unfair labor practices. The Board’s specific findings of fact and conclusions of law as to individual appellants are made purposeless by the Wisconsin Court’s apparent construction of the final order.

We believe that a fair analysis of the final order, as confirmed by the Court, establishes that the State Board sought to accomplish state purposes which are repugnant to and in conflict with the federal purposes under the National Act.

The respondents urge that this Court’s decision in the *Fansteel Metallurgical Corp. v. N. L. R. B.*, 306 U. S. 240, supports the authority of the State Board to terminate the statutory protection and benefits of striking employees

who commit wrongful acts in the course of a labor dispute. The Fansteel case, we submit, gives no such support to respondent's contention. In its Fansteel decision this Court refused to confirm an order of reinstatement by reason of a discriminatory discharge because of the wrongful conduct of the strikers involved. Such reinstatement would not serve to fulfill the aims and purposes of the National Act. The State of Wisconsin, however, in its State Act terminates the right of striking employees guilty of unfair labor practices, as set forth in section 111.06 (2) (a) to (j), to statutory protection or exercise of statutory benefits.

There is a considerable difference between the refusal of the Board to reinstate because of misconduct of strikers and the State itself terminating the right to protection from discrimination because of minor acts of misconduct of strikers. It is this aim and objective of the State Act which makes the Act so drastically repugnant to federal regulation and purposes.

VIII.

Conclusion.

The Wisconsin cases referred to above establish the imperative necessity for a decision in this case on the merits. The federal purposes of the National Act are impossible of achievement in Wisconsin because of the intrusive and improper claim to jurisdiction over the subjects covered by the Federal Act on the part of the State Board.

Neither reason nor authority can support the attempt of the State to undermine the supremacy of the National Act in the field of labor relations affecting interstate commerce. The extension of State acts of the character of the Wisconsin Act to other states will certainly nullify the National Act.

The warnings of Justice Jackson against Balkanizing American commerce, as stated in **Duckworth v. Arkansas**, 86 L. Ed., page 261, are particularly applicable to the Wisconsin Act. The State Act cannot be viewed as an exercise of the police power alone but rather as a local system for restraining Federal regulation of interstate commerce. Justice Jackson stated:

“Congress may very properly take into consideration local policies and dangers when it exercises its power under the commerce clause. But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national society” (86 L. Ed., at p. 267).

The foregoing statements are particularly applicable in the instant case. We submit this Court should hold the Wisconsin Act unconstitutional as applied to interstate commerce and reverse the Order of the Board issued in this case with costs.

Respectfully submitted,

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APPENDIX.

Memorandum accompanying Order and Direction of Election in petition of Allen-Bradley Company to determine Bargaining Representatives:

"The Allen-Bradley Company, a corporation located in the City of Milwaukee, Wisconsin, on the 9th day of September, 1940, filed with this Board a petition requesting the Board to conduct an election among the employes of the Company constituting the production, maintenance, testing and service employes, for the purpose of determining whether or not such employes desire to be represented for the purpose of collective bargaining by Local No. 1111, United Electrical, Radio and Machine Workers of America, affiliated with the C. I. O. The Company is engaged in the manufacture and sale of electrical control equipment, employs a total of approximately 900 men and women, of which approximately 500 are employed in a capacity bringing them within the proposed collective bargaining unit.

"The Company's office and manufacturing plant is located in the City of Milwaukee, Milwaukee County, Wisconsin. The majority of the raw materials obtained for use in the Company's manufacturing operations is obtained from sources outside the State of Wisconsin, and a majority of its finished product is sold and shipped out of the State of Wisconsin.

"Local No. 1111, on July 1, 1939, filed with the National Labor Relations Board charges against the Allen-Bradley Company, alleging that the Allen-Bradley company interfered with, discriminated against and is coercing employes who are members of Local No. 1111, that the Company has failed to bargain with the Union in good faith, that it engaged in unlawful acts in order to disrupt and destroy the Union, that it had promised and offered preferential treatment and security of employment to persons active in their em-

ployment during the course of a strike without regard to the right of the striking employees, all for the purpose of disrupting and destroying the right of said employees under the National Labor Relations Act. On September 20, 1939, the Union filed amended charges against the Company, which were similar in nature, but far more detailed. Up to the time of the hearing on this matter on the 24th day of September, 1940, although the original charges had been filed nearly a year and a quarter prior to the time of such hearing, it did not appear that the National Labor Relations Board had taken any steps to prosecute such charges, although an investigation of the charges had been made early in the year. There was received in evidence a letter signed by John G. Schott, Regional Director of the Twelfth Region of the National Labor Relations Board, addressed to Max E. Geline, Attorney for Local No. 1111. It was stipulated by the parties that such letter might be received and the statements contained therein would be considered the testimony given by Mr. Schott if he were called as a witness. Mr. Schott stated that the charges made against the Allen-Bradley Company had been investigated by the office of the Twelfth Region, that a report had been made to the National Labor Relations Board, and that the Board had directed Mr. Schott as such Regional Director to issue a complaint against the Allen-Bradley Company alleging a violation of Section 8 (2) (3) and (5) of the National Labor Relations Act. Mr. Schott further stated that he had directed the acting Regional Attorney to prepare such a complaint as soon as the legal schedule of the office permitted.

“The Union objects to this Board taking any proceeding to determine the wishes of the employees of the Allen-Bradley Company at this time on the ground that the National Labor Relations Board has authorized the issuance of a complaint against the Company, charging among other things that the Company has failed to bargain in good faith with Local No. 1111 as the exclusive bargaining agency of employees in a

collective bargaining unit, and that if any such proceedings were conducted by this Board, they would be in conflict with the orderly administration and enforcement of the National Labor Relations Act by the National Labor Relations Board. The Union argues that there is no question in the eyes of the government of the United States whether Local No. 1111 represents a majority of the employees of the Allen-Bradley Company or not, and that if there were any such question, the National Labor Relations Board would not authorize the issuance of a complaint charging the Company with failure to bargain in good faith, in violation of Section 8 (5) of the National Labor Relations Act. They further argue that because such complaint has been authorized, there is a presumption of some unfair labor practices on the part of the Company during this whole period of time, and continuing up to the present time, and therefore this Board should not order an election under the circumstances of a situation where unfair labor practices are committed.

"This Board has never determined the question as to how far it might go in denying a petition proper in form when there appears to be a question of representation raised, but proof was offered that satisfied the Board that the Company was guilty of unfair labor practices. If we were convinced that the unfair labor practices were of such nature and the employees, as a result of such practices, of such a mentality that it would be impossible by a secret ballot to determine their true desires with reference to collective bargaining, it might be that the Board would conclude it had the power and might see fit to exercise the power to dismiss the petition and refuse to conduct the election.

"We have present in this case, however, no such situation, and as we see it no proceeding pending which will in any way conflict with the orderly administration by the National Labor Relations Board of the

National Labor Relations Act. Even though counsel for the Union's position is correct, and we do not believe that legally it is, that a presumption of guilty arises upon the issuance by the National Labor Relations Board of a complaint charging an employer with unfair labor practices, it is our position that it will take more than a mere presumption of guilt before we will deny to either an employer or employes the right to express by secret ballot at an election fairly conducted their wishes as to collective bargaining.

"The manufacturing plant of the Allen-Bradley Company is located in Wisconsin. The employes in that plant live in Wisconsin, work in Wisconsin, their employment contract is made in Wisconsin. The legislature of this State has seen fit to pass legislation protecting the rights of the Wisconsin Employes to bargain collectively through representatives of their own choosing, without coercion from any source, and in determining whether or not employes desire to so bargain and what representative they desire to represent them, has provided that such determination may be made only by a secret ballot at an election conducted by this Board. Under this law, employers are required to bargain collectively with any representatives selected by a majority of his employes as the exclusive bargaining agent for all. *This Board has been given the duty of administering the provisions of the Wisconsin Employment Relations Act, and the only way it may be administered, in our opinion, is by conducting elections in all cases in which a question of representation arises among the employes of Wisconsin industries, and where such question is in existence at the time the election is asked for. (Italics added.)*

"We have recognized the authority of the National Labor Relations Board, and do recognize it in any case in which that Board has seen fit to pass upon a representation question when its jurisdiction has been properly invoked, and call the attention of the parties

to our decision in the Matter of the Petition of the Independent Union for an election at the Allis-Chalmers Manufacturing Company. No investigation of representatives of the Allen-Bradley Company has ever been made by the National Labor Relations Board, and none has ever been requested, and that Board has never been called upon to certify a collective bargaining representative. We do not feel that merely because at some time in the future the National Labor Relations Board may see fit to issue a complaint against the Allen-Bradley Company based on charges filed more than one year ago, that this Board should not at this time submit to the employees of the Allen-Bradley Company a question of their desires in reference to their collective bargaining representative.

“In submitting this question to the employees of the Allen-Bradley Company, we do not take the position that any election conducted by this Board will be binding upon any other administrative board which might have jurisdiction over such questions. It will determine the rights of the parties as such rights are affected by the Wisconsin Statutes. It will in no way interfere with any proceeding to be commenced in the future by the National Labor Relations Board, nor in the prosecution of any complaints such Board may see fit to prosecute against the Allen-Bradley Company. We recognize that such election can in no way limit the power of the National Labor Relations Board nor limit the order that such Board might make as a result of any hearings it may hold in the future, if such complaint is filed and hearings are held. If we felt that the conduct of an election among the employees of this plant would in any way interfere with the orderly administration of the duties of any national administrative board having jurisdiction to proceed, we would without hesitation come to a conclusion different from that contained in our Order of this date. Because we are unable to find any such conflict or any such interference, because the statute under which we are organized is so clear and explicit, and because

it clearly appears to us that there now exists a question of representation among these employees, we feel that an election should be held at this time in order that such employees may have an opportunity to freely express their opinion by secret ballot as to whether they desire this Union to continue to represent them or not."

**"WISCONSIN EMPLOYMENT RELATIONS
BOARD,**

By Henry C. Fuldner,
Henry C. Fuldner, Chairman,
L. E. Gooding,
L. E. Gooding, Commissioner,
R. Floyd Green,
R. Floyd Green, Commissioner."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 252

**ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRIC,
RADIO AND MACHINE WORKERS OF
AMERICA, ET AL.,**

vs.

Appellants,

**WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM.**

JOHN E. MARTIN,

Attorney General of Wisconsin;

✓ **JAMES WARD RECTOR,**

Deputy Attorney General of Wisconsin;

N. S. BOARDMAN,

✓ **HAROLD H. PERSONS,**

Assistant Attorneys General of Wisconsin;

• *Counsel for Appellee,*

Wisconsin Employment Relations Board.

✓ **LOUIS QUARLES,**

LEO MANN,

Counsel for Appellee,

Allen-Bradley Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, FRED WOLTER, ESTHER KUSMIEREK, ESTHER GREENMEIER, SOPHIE KOSCIERSKI, FRANCES CHANDEK, AGNES TANKO, HARRY ROSE, DAN ROKNICH, TONY CALABRESA, EDWARD OKULSKI, PETER BLAZEK, EILIF TOMTE, EDWARD LARSON AND MIKE DEMSKI,

vs.

Appellants,

**WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY, A WISCONSIN CORPORATION,**

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEES' STATEMENT OPPOSING APPELLATE JURISDICTION.

Pursuant to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, appellees file this statement opposing appellate jurisdiction.

Nature of the Case.

This appeal is from a judgment of the Supreme Court of the State of Wisconsin affirming a judgment of the Circuit Court of Milwaukee County, Wisconsin, which, in turn sustained and enforced an order of the Wisconsin Employment Peace Board (hereafter called "Wisconsin Board") made and entered under Section 111.07 of the Wisconsin Employment Peace Act—hereafter called "Wisconsin Act"—(Chapter 57, Laws of 1939; Wisconsin Statutes (1939), Chapter 111, sec. 111.01 to 111.19, pp. 1610-1618).

The order and judgment thereby sustained required the appellant Union, Allen-Bradley Local #1111, United Electrical, Radio & Machine Workers of America, to cease and desist from certain unfair labor practices. They contained no clause directed to the 14 individuals named as appellants. As to them, the action of the Wisconsin Board was limited to (a) the making of findings of fact that they committed violence and other acts of misconduct and (b) a conclusion of law that they were therefore guilty of unfair labor practices under the specific sections of the Wisconsin Act in question.

The judgment of the Supreme Court was entered January 7, 1941, in proceedings commenced by appellants in the courts of the State of Wisconsin to review the order of the Wisconsin Board. The real controversy arises over the validity of the portions of the Wisconsin Act on which the order is based, as applied to the appellants, because of their relationship to the appellee, Allen-Bradley Company, a Wisconsin corporation, so engaged in interstate commerce as to be subject to the National Labor Relations Act in a proper case.

Appellants conceded below that the Wisconsin Act regulates various phases of employer-employee relations or what

may be termed labor relations, as an exercise by the State of its police power. In their brief before the Wisconsin Supreme Court counsel stated that they did not attack the validity of the Wisconsin Supreme Court decision in *Fred Reuping Leather Co. v. Wisconsin Labor Relations Board*, 228 Wis. 475, to the effect "that the National Labor Relations Act had not pre-empted the field of labor relations, and that the Wisconsin Labor Relations Act of 1937 is equally applicable to parties engaged in interstate commerce and subject to the National Labor Relations Act. We assume, for purposes of appeal to this Court, that the State retains the right, based on its police powers, to enact a labor relations law which is consistent with the Federal regulation of the same subject." (Appellant's Brief in Wisconsin Supreme Court, pp. 59 and 60).

In their present assignment of errors and statement as to the jurisdiction on this appeal, appellants however now take the contrary position, that in enacting the National Act, Congress has completely pre-empted this field and that therefore the Wisconsin Act is invalid.

Appellants concede that the National Act regulates only the conduct of employers and creates only employer unfair labor practices, but content, in spite of this, that the sections of the Wisconsin Act here involved which define and create unfair labor practices on the part of Unions and employees, are, nevertheless, in direct conflict with the National Act, and are, therefore, repugnant to the Federal Constitution.

The field of labor relations is a matter which has always been subject to regulation solely by the States in the exercise of their police power. The only recognized exception arises from the indirect regulation of this subject by Congress through the enactment of the National Labor Relations Act, not based upon any power to regulate labor

relations as such, but based entirely upon the power to regulate interstate commerce.

Therefore, the contention that by this exercise of its power to regulate interstate commerce, Congress has deprived the States of all power and right to exercise their police powers in this entire field, is so startling as to immediately establish its unsoundness. The contention is all the more startling, in view of the fact that the Federal Act relates only to employer unfair labor practices, whereas the portions of the Wisconsin Act here involved relate entirely to unfair labor practices by unions and employees, —persons whose acts are in no way regulated or covered by the Federal Act.

Statutes Involved.

Article I. Section 8, of the Federal Constitution, so far as here material, provides:

“Congress shall have the power to regulate the commerce with the foreign nations and among the several states.”

The National Labor Relations Act (49 Statutes 449) so far as here material provides:

“Sec 2. When used in this Act—

“ . . .

“ . . .

“(3) The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment,
“ . . . ”

“Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere"

The Wisconsin Employment Peace Act, so far as material here, provides:

"111.02. Definitions. When used in this chapter:

.. . .

"(3) The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder,"

"111.04 Rights of employees. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

"111.06 What are unfair labor practices. . . ."

.. . .

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

"(e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

"(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

"(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

Statement of Facts.

The respondent, Allen-Bradley Company, is a Wisconsin corporation engaged in the manufacture and sale of electrical control equipment and radio parts. Its plant is in Milwaukee where it employs approximately 700 people. For two years, the appellant Union had been the exclusive

bargaining agent of the Company's production employees and had had two annual labor contracts with the Company. The appellant Union and many of its members went out on a strike on May 11, 1939. The Company continued to operate its plant throughout the strike which lasted for about three months. During the course of the strike, the Union and many of the striking employees engaged in a deliberate and planned course of violence, threats, disorder, mass picketing, obstruction of streets, etc., for the admitted purpose of interfering with and, if possible, preventing the continued operation of the plant. The Company thereupon commenced a proceeding before the Wisconsin Board under Section 111.07 of the Wisconsin Act to prevent the continuance of these unfair labor practices.

After an extended hearing, the Board, in its Final Order, found that appellants had engaged in the following unfair labor practices:

(a) Engaged in mass picketing at all entrances for the purpose of hindering and preventing the pursuit of lawful work and employment by employees who desired to work. (Finding No. 5, R. 23, C. 21)

(b) Obstructed and interfered with the entrance to and egress from the factory and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory. (Finding No. 6, R. 23, C. 21)

(c) Threatened bodily injury and property damage to many of the employees who desired to continue their employment. (Finding No. 7, R. 23, C. 21)

(d) Required of persons desiring to enter the factory without interference that they obtain passes from the Union. (Finding No. 8, R. 23, C. 21)

(e) Picketing the domiciles of employees who continued to work. (Finding No. 9, R. 23, C. 22)

(f) That the Union by its officers and many of its members injured the persons and property of employees who desired to continue their employment. (Finding No. 10, R. 23, C. 22)

(g) That the 14 individual appellants who were striking employees; had engaged in various acts of misconduct, including intimidating and preventing employees from pursuing their work, by threats, force, coercion, and assault, by damaging property belonging to employees who continued to work; and as to one of them, by carrying concrete rocks which he intended to use to intimidate employees who desired to work. (Findings No. 11 to No. 17, R. 24-25, C. 22-23)

Based upon these Findings, the Board, as a Conclusion of Law, found that the Union was guilty of unfair labor practices in the following respects:

(a) Mass picketing for the purpose of hindering and preventing the pursuit of lawful work.

(b) Threatening employees desiring to work with bodily injury to their property.

(c) Obstructing and interfering with entrance to and egress from the factory.

(d) Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory.

(e) Picketing the domiciles of employees. (R. 25, C. 24)

As to the 14 individual appellants, the Board concluded that each of them was guilty of unfair labor practices by reason of threats, assaults, and other misdemeanors committed by them as set out in the Findings of Fact. (R. 25, C. 24)

Based upon these Findings of Fact and Conclusions of Law, the Board ordered that the Union and its officers, agents, and members shall:

(1) Cease and desist from:

(a) Mass picketing.

(b) Threatening employees.

(c) Obstructing or interfering with the factory entrances."

(d) Obstructing or interfering with the free use of public streets, roads, and sidewalks.

(e) Picketing the domiciles of employees.

(2) The Order required the Union to post notices at its headquarters that it has ceased and desisted in the manner aforesaid and to notify the Board in writing of steps taken to comply with the Order. (R. 26, C. 25)

So far as the 14 individual appellants are concerned the Final Order merely contains the conclusion that they are guilty of unfair labor practices. No further provision or order is made as to them.

The case was brought into the Circuit Court by the petition of the appellants to review this Order. Issue was joined by the Answer and Cross-Petition for enforcement of the Order by the Wisconsin Board (R. 29, C. 26), and by the Answer of the respondent Company. (R. 56, C. 50) The Circuit Court confirmed the Order and entered Judgment enforcing it.

It will be noted that the Order involved in this appeal is called "Final Order." After the hearing, the Board on July 13, 1939, issued its Interlocutory Order by which it made Findings of Fact, Conclusions of Law, and an Order substantially similar to the Final Order, except that it did not specifically find any individual employees

by name, to have been guilty of unfair labor practices. This Interlocutory Order was made pursuant to Section 111.07 (4), which provides that "pending the final determination by it of any controversy before it the Board may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders."

The Board filed a Petition in the Circuit Court under Section 111.07 (7) to enforce the Interlocutory Order. A Decision confirming that Order was made by Judge Breidenbach December 14, 1939 (R. 111, C. 60), and pursuant thereto, Judgment enforcing the Interlocutory Order was entered January 4, 1940. (R. 133, C. 74)

Judge Breidenbach's decision confirming the Final Order refers in part to his decision confirming the Interlocutory Order. It appears at Record 61, Case 53. This appeal, however, is only from the Judgment which confirms and enforces the Final Order. As stated before, the only substantial difference between the Interlocutory Order and the Final Order is that the Final Order specifically names the 14 individual appellants and finds that they have committed unfair labor practices.

In the hearing before the Wisconsin Board, it was stipulated that a large part of the Company's business, both as to purchases and sales, is made from sources outside of the State of Wisconsin and to purchasers outside of the State; that the Company is, therefore, engaged in interstate commerce to a sufficient extent that if the National Labor Relations Board assumed jurisdiction by issuing a Complaint under the National Labor Relations Act (hereinafter called the "National Act"), the Company would concede the jurisdiction of the National Board to proceed under that Act. (R. 164-165, C. 89)

The Board's interlocutory order was entered July 13, 1939. On petition for enforcement of that order by the Wisconsin Board the Circuit Court of Milwaukee County

sustained and enforced the order by opinion dated September 14, 1939, and a judgment dated January 4, 1940. No appeal was taken therefrom.

On February 1, 1940, the Wisconsin Board entered the final order. On petition by the appellants to review this final order and on cross petition by appellees for enforcement thereof, pursuant to express provisions of the Wisconsin Act, the final order was affirmed by the Circuit Court of Milwaukee County by opinion dated July 16, 1940, and enforcement thereof granted by judgment dated September 3rd, 1940. (R. 57, C. 58)

Judgment of the Supreme Court appealed from in the case before this Court was rendered upon appeal to the Supreme Court of Wisconsin by appellants herein from said last mentioned judgment.

No Substantial Federal Question is Presented.

An analysis of appellants' statement as to jurisdiction, their petition for appeal and assignment of errors establishes two grounds on which they claim a substantial Federal question is presented. They are:

1. That by enacting the National Labor Relations Act (Hereinafter called the "National Act") Congress has so pre-empted the field of labor relations, within the general scope of the National Act, as to make invalid the State's exercise of its police power in enacting legislation in this part of the field of labor relations.

2. That sec. 111.02 (3) (b) of the Wisconsin Act defining the term "employee . . . when used in this chapter," as applied to the fourteen individual appellants, is in direct conflict with sec. 2 (3) of the National Act defining "employee . . . when used in this act."

These contentions are so lacking in merit as to raise no substantial federal question.

The National Act Has Not Pre-empted the Entire Field of Labor Relations.

We agree with appellants' counsel that the National Act is a valid exercise of the constitutional power of Congress to regulate interstate commerce. *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 57 Sup. Ct. 615, 81 L. ed. 893; *Phelps Dodge Corp. v. National Labor Relations Board*, — U. S. —, 61 Sup. Ct. 845, 85 L. ed. 753.

It needs no citation of authority, however, to establish the proposition that in passing that act, based upon the congressional authority to protect interstate commerce, there was no intention, nor in fact was there power, to impair or restrict the general police power of the states. This is recognized by this Court in the *Jones & Laughlin* case in the following language:

“If this conception of terms, intent and consequent inseparability were sound, the act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth amendment. * * * The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce ‘among the several states’ and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.” (Page 30)

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“Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is

national and what is local and create a completely centralized government. (p. 37.)"

On this subject the Wisconsin Supreme Court said in the opinion in the instant case, 237 Wis. 164, at 173:

"It is manifest from these and other declarations of the United States supreme court in the consideration of the provisions of the National Labor Relations Act that the federal government can proceed only so far with the regulation of labor relations as is necessary to protect interstate commerce, remove burdens from it, and prevent obstructions to it. The more study one gives to the National Labor Relations Act, the more he is moved to admire the consummate skill with which it was drafted for the declared purpose of regulating and protecting interstate commerce, and yet at the same time leaving the field of proper state action unrestricted so far as possible. . . ."

This Court is bound by the final decisions of the State Court interpreting and applying its own statutes. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188; *Klaxon Co. v. Stentor Elec. Mfg. Co.* No. 741, October Term, 1940 (June 2, 1941).

The Supreme Court of Wisconsin held in this case that the Wisconsin Act was enacted as an exercise of the police power. In this connection it said:

"The Wisconsin Employment Peace Act deals with labor relations in the exercise of the police power of the state." 237 Wis. 164, 179.

It reached a similar decision in the case of *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, at p. 481, which involved the 1937 Wisconsin Labor Relations Act, superseded by the present Wisconsin Act here involved passed in 1939.

The various acts of misconduct which the judgment here forbids are acts of clear wrong doing. They are acts which

constitute violations of law in any society. They are acts, the commission of which in the long run are not in the best interest of the country or of labor itself. They are acts against which concededly the National Act affords no remedy.

As stated by the Wisconsin Supreme Court, at page 180, appellants contend in effect that the failure of Congress in enacting the National Act to define unfair labor practices on the part of unions or employees, in effect operates as a license to the employees in the enforcement of their demands to do any or all of the things declared by the Wisconsin Act and by this judgment to be unfair labor practices. The error in this contention is apparent. In fact it is interesting to note that in their own statement in support of jurisdiction, appellants' counsel concede that the National Act does not deprive the state of its police power to prohibit and punish acts of the very type covered by the judgment in this case. On the last page of their argument counsel state:

"This is not a case where the State Act merely prohibits and punishes unlawful acts against the peace and order of the state committed by individuals in the course of a labor dispute. *There is no issue as to the existence of such powers in the state.*" (Emphasis ours)

The National Act is not a general regulation by Congress of the entire field of labor relations. It is nothing more than a regulation of interstate commerce by regulating, in limited and specific manner, the conduct of employers only—one small part of the field of labor relations.

In *Amalgamated Utility Works v. Consolidated Edison Co.*, (1940) 309 U. S. 361, 84 L. ed. 738, this Court held that a union, which had been a party in a case before the National Labor Relations Board, had no standing to press a

charge of contempt for violation of the Board order on the ground that the act created no private rights,—that the Board's order was made on behalf of the public and that the Board was the sole authority to secure the prevention of unfair labor practices under the Act. The court held further in the case (p. 363) that no provision of the National Act

“ . . . can properly be said to have ‘created’ the right of self-organization or of collective bargaining through representatives of the employees’ own choosing. In *National Labor Relations Bd. v. Jones & L. Steel Corp.* 301 U. S. 1, 33, 34, 81 L. ed. 893, 909, 910, 57 S. Ct. 615, 108 A. L. R. 1352, we observed that this right is a fundamental one; that employees ‘have as clear a right to organize and select their representatives for lawful purposes’ as the employer has ‘to organize its business and select its own officers and agents;’ that discrimination and coercion ‘to prevent the free exercise of the right of employees to self-organization and representation’ was a proper subject for condemnation by competent legislative authority. We noted that ‘long ago’ we had stated the reason for labor organizations,—that through united action employees might have ‘opportunity to deal on an equality with their employer,’ referring to what we had said in *American Steel Foundries v. Tri-City Central Council*, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 A. L. R. 360. And in recognition of this right, we concluded that Congress could safeguard it in the interest of interstate commerce and seek to make appropriate collective action ‘an instrument of peace rather than of strife.’ To that end Congress enacted the National Labor Relations Act.”

The regulation of labor relations generally is a subject which has always been considered as properly belonging to the states under the police power. It was a field which many persons believed to be exclusively reserved to the

states. The Supreme Court of Wisconsin in the opinion in this case, at pages 176 and 177, said this with respect to that subject:

“ * * * Prior to the adoption of the National Labor Relations Act and the decision of the United States Supreme Court sustaining it, many persons supposed labor relations to be a subject reserved to the states by the Tenth amendment to the constitution of the United States and that it was beyond the competency of congress to deal with the subject. No doubt it is because of that fact that the act so meticulously delimits the power and authority of the labor board to matters which substantially affect interstate commerce, that being a subject over which congress has, when it is exercised, exclusive jurisdiction. Hence congress does not seek in the National Labor Relations Act to deal with labor relations generally. It deals with labor relations only so far as in its opinion it is necessary to protect interstate commerce from being impeded or obstructed by unfair labor practices on the part of employers.”

To the same effect is *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 488-489.

It is clear, therefore, that the National Act rests entirely upon the power of Congress to regulate interstate commerce and to protect it from burdens and obstructions, while the Wisconsin Act is a regulation of “ * * * labor relations in the interests of the peace, health and order of the state * * * ”. *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, *supra*. That case held further that in the absence of a Federal statute pre-empting the field “the police power of the state has full operation, provided no undue or discriminatory burdens are put upon interstate commerce.”

The fact that the National Act has not pre-empted the field of labor relations so as to exclude the States from legis-

lating in that field, is established further by the decision of this Court in *Lauf v. E. G. Shinner & Co.*, (1938) 303 U. S. 323, 58 S. Ct. 578, 82 L. Ed. 872. In that case this court gave effect to the Wisconsin Labor Code, as there involved, and held that the construction and application of the Wisconsin constitution and statutes by the Wisconsin Supreme Court was conclusive upon the district court and upon this Court. That case was decided by the court after the enactment of the National Act, which was passed in 1935. The sections of the Wisconsin Labor Code, there given effect, regulated to a certain extent the matter of labor relations.

It probably was a consciousness of that decision which led to the admission by appellants' counsel in their jurisdictional statement of the existence of State power to prohibit and punish unlawful acts against the peace and order of the State, although committed in the course of a labor dispute.

But this admission of power in the State to so exercise its police power in the field of labor relations is much too limited.

Counsels' admission that the State may prohibit or punish certain conduct during a labor dispute, admits the continued existence of police power to regulate labor relations. The Wisconsin Supreme Court states this conclusion as follows in the opinion herein, at page 184, as follows:

"When appellants concede that the state may punish unlawful acts of strikers who are engaged in striking because of unfair labor practices of their employer, they concede the power of the state to deal with some aspects of every labor dispute. . . ."

The existence of such power necessarily leaves the State free to exercise it as the State desires so long as the State action does not directly conflict with national action or

otherwise unduly discriminate against, burden or obstruct interstate commerce.

No claim is made in this case that the Wisconsin Act unduly discriminates against, burdens or obstructs interstate commerce.

The Wisconsin Supreme Court, in speaking of the Wisconsin Act said further:

"On the other hand, state action is regulatory in its nature and is designed to bring about industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services for the promotion of the general welfare. . . . The state act seeks to forestall action which may lead to disorder and loss of life and property." (R. 184.)

The Provisions of the Wisconsin Act Here Involved Are Not in Conflict With the National Act.

Appellants' main contention as to conflict is based upon a difference between the definition of "employee" in the two acts. The alleged conflict disappears, however, upon giving effect to the decision of Wisconsin Supreme Court in this case, construing and applying the Wisconsin definition. Appellants contend that the 14 individual appellants who were found guilty of unfair labor practices are still employees under the terms of the National Act but that their employee status terminated because of the findings of fact and conclusions by the Wisconsin Board that they were guilty of an unfair labor practice. Appellants' contention in this respect is stated as follows in their statement as to jurisdiction:

"Under sec. 111.02 (3) (b) of the State Act set forth above, striking employees, who are found guilty of unfair labor practices, *automatically* lose their status as employees for the purposes of the State Act." (Italics ours.)

In making this contention counsel entirely ignore the express and unequivocal language in the decision of the Wisconsin Supreme Court on this phase of the case. As pointed out above, the Board's order in this case made no order as to the individual appellants. It contained *findings of fact* as to the various acts of misconduct of which they were guilty, and a conclusion of law that each of them was guilty of unfair labor practices by reason of the threats, assaults and other misdemeanors committed by them as set out in the findings. *But it contained no further provision or order as to them.*

In disposing of the same contention made by appellants before Wisconsin Supreme Court, it said: —

“ * * * a mere finding of the Wisconsin Employment Relations Board does not affect the employer and employee relationship.” (R. 182.)

In discussing this matter the court said with respect to sec. 111.02 (3), the section on which appellants' counsel base their contention:

“Considering the language of this section by itself, it may warrant the interpretation put upon it by appellants, that is, that a mere finding is sufficient to deprive the employee of his status. However, when considered in connection with other provisions of the act, we think it cannot be so interpreted. That part of sec. 111.07 (4), Wis. Stats. 1939, which is material here is as follows:

“‘Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action including reinstatement of employees with or without pay, as the board may deem proper.’

“The continuation of the status of an employee is certainly a right or privilege. The act specifically pro-

vides how it shall be terminated, that is by order of the board." (R. 182.)

The court then held that sec. 111.07 (7) and (8) of the Wisconsin Act providing for a review of the Board orders makes no provision for "reviewing the findings", and goes on to say that the court:

" . . . examines the record to ascertain whether the findings are supported by the evidence. Its judgment may operate only upon the provisions of the order. It is considered, in view of the large discretionary power committed to the board, that the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order.

"
 "As already stated, the manner and the extent to which the act shall apply in a particular case pending before it is committed to the discretion of the board. Its commands are found in the order, which determines the status and obligations of all parties to the controversy, not in the findings. In the board's order under review, there is no provision which suspends the status as employees of the fourteen individual appellants found guilty of unfair labor practices. In this case, for the reasons stated, there is no conflict in regard to employee status." (R. 185.)

Since this construction of the Wisconsin Act is binding on this Court, it is clear that there is nothing in the Wisconsin statute nor in the order of the Board affirmed by this judgment which in any way suspends or terminates the status of these employees, as appellants' counsel still maintain.

Consequently such rights as they may have under the National Act continue unaffected by the judgment here appealed from. Therefore there can be no conflict between the two laws in this regard.

The Wisconsin Supreme Court pointed out another complete answer to this phase of the case as follows:

"In response to the argument made by appellants that there is a conflict between the two acts because of the difference in definitions, we point out that these definitions apply only for the purposes of the act in which they are found. In sec. 2 of the National Labor Relations Act certain terms used in the act are defined. That section begins, 'When used in this act,' the various terms defined mean thus and so. Definitions of terms in the Wisconsin Employment Peace Act are found in sec. 111.02, Wis. Stats. 1939. That section begins, 'When used in this chapter,' the term defined includes or means thus and so. In controversies in which the National Labor Relations Board takes jurisdiction, it will in the course of its determination apply the definitions contained in the National Labor Relations Act. When the Wisconsin Employment Relations Board takes jurisdiction of a labor dispute it will apply the definitions contained in the Wisconsin Employment Peace Act in formulating its determinations. * * *

There are No Other Issues in This Case.

In their statement as to jurisdiction, appellants' counsel state "the appellants have drawn into the question the entire act on the ground that in its entirety it is repugnant to the commerce clause of the Federal constitution and the National Labor Relations Act." Nowhere does counsel argue that the Wisconsin Act in any way burdens or obstructs interstate commerce. Nothing is clearer than the principles that a statute, or the portion thereof attacked, will be presumed to be constitutional, that the court will limit its decision to the issues involved and will not engage in broad declarations upon constitutional questions as to portions thereof not involved in the case before the court. No principle of law is more firmly established than that no

litigant can be the champion of constitutional rights except to the extent that his own rights are affected.

Lehon v. Atlanta, 242 U. S. 53, 56, 61 L. Ed. 145;

Bandini Petroleum Co. v. Superior Court (1931), 284

U. S. 8, 76 L. Ed. 136-145;

Southern Petroleum Co. v. King (1910), 217 U. S. 524, 534, 54 L. Ed. 868.

As stated by Justice Cardozo in *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814:

“• • • The plaintiffs are not champions of any rights except their own.” (R. 583.)

The case at bar involves only issues of unfair labor practice by the union and by employees. The National Act creates unfair labor practices only on the part of employer. As stated in the opinion of the Wisconsin Supreme Court:

“In this case the employer has never been charged with an unfair labor practice nor has the National Labor Relations Board ever been requested to determine who is the proper bargaining representative. Consequently, the National Labor Relations Act has never been applied to the labor dispute here under consideration, and it may never be applied, depending upon the exercise of the discretion of the National Labor Relations Board. • • •” (R. 180.)

The judgment in this case affirming the Board's order does nothing more than to require the appellant Union, its officers, agents and members to cease acts of misconduct which would constitute violations of law in any society. The conduct ordered to end includes mass picketing, threatening employees, and obstructing or interfering with the free use of roads, streets and sidewalks.

As stated in the petition for appeal the order is based upon the company's charges of violations of sec. 111.06 (2a)

to (j) and sec. 111.06 (3) of the Wisconsin Act, which define certain acts to be unfair labor practices. No other portion of the Act is involved or in issue in this case. Therefore the attempt of appellants to bring into question and challenge other sections of the Act not involved in the judgment here appealed from, is clearly erroneous.

Conclusion.

We submit, therefore, that no substantial Federal question is here presented because

- (a) Congress has not pre-empted the entire field of labor relations in enacting the National Act;
- (b) The State of Wisconsin still has the right in the exercise of its police power to regulate in the field of labor relations so long as in so doing the State does not directly conflict with the National Act or burden or obstruct interstate commerce;
- (c) The order in this case and the judgment affirming said order merely prohibit the commission of acts in themselves wrongful in any society.
- (d) The Wisconsin Act and the judgment in this case as construed and applied by the Wisconsin Supreme Court does not in any way affect the employee status of the fourteen individual appellants;
- (e) Within the issues of this case the Wisconsin Act and the judgment in no way conflict with the National Act and in no way burden or obstruct interstate commerce.
- (f) The various hypothetical conflicts which appellants endeavor to raise are in no way involved in this case.

From the foregoing it is submitted that the decision of the Supreme Court of Wisconsin on the Federal question is so

plainly right as not to require re-argument and therefore no substantial Federal question is presented.

Re Boardman (1897), 169 U. S. 39, 42 L. Ed. 653, 18 Ct. 291;

Re Spies (1887), 123 U. S. 131, 31 L. Ed. 80, 8 S. Ct.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED, ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, FRED WOLTER, ESTHER KUSMIEREK, ESTHER GREENMEIER, SOPHIE KOSCIERSKI, FRANCES CHANÉK, AGNES TANKO, HARRY ROSE, DAN ROKNICH, TONY CALABRESA, EDWARD OKULSKI, PETER BLAZEK, EILIF TOMTE, EDWARD LARSON AND MIKE DEMSKI,

Appellants,

vs.

**WISCONSIN EMPLOYMENT RELATIONS BOARD,
AND ALLEN-BRADLEY, A WISCONSIN CORPORATION,**

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes Now the Wisconsin Employment Relation Board, by John E. Martin, Attorney General of the State of Wisconsin, James Ward Rector, Deputy Attorney General of the State of Wisconsin, and N. S. Boardman and Harold H. Persons, Assistant Attorneys General of the State of

Wisconsin, its counsel, and Allen-Bradley Company, by Louis Quarles and Leo Mann, its counsel, appellees herein, and move this Court to dismiss with costs the appeal taken herein to this Court by the above named appellants upon the following grounds:

1. No substantial Federal question is involved.
2. The decision of the Supreme Court of Wisconsin is in accord with the decisions of this Court.
3. The decision of said State court was so plainly right as not to require reargument.

In the alternative appellees move this Court to affirm on the ground that the questions on which the decisions of the cause depend are so unsubstantial as not to need further argument.

Dated this 16th day of June, 1941.

JOHN E. MARTIN,

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State of Wisconsin;*

JAMES WARD RECTOR,

*Deputy Attorney General of the
State of Wisconsin;*

N. S. BOARDMAN

and

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*Counsel for Appellee Wisconsin Em-
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LOUIS QUARLES

and

LEO MANN,

*Counsel for Appellee
Allen-Bradley Company.*

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CHARLES EMMETT JOHNSON

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941
No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELEC-
TRICAL, RADIO AND MACHINE WORKERS OF
AMERICA, ET AL.,

Appellants,

WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY,

Respondents.

Appeal from the Supreme Court of the State
of Wisconsin

Brief of Respondent
Wisconsin Employment Relations Board

JOHN E. MARTIN,
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✓ N. S. BOARDMAN,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941
No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, ET AL.,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY,

Respondents.

Appeal from the Supreme Court of the State
of Wisconsin

Brief of Respondent.
Wisconsin Employment Relations Board

On October 13, 1941 this Court noted probable jurisdiction of this appeal.

OPINIONS OF THE COURT BELOW

The opinion of the State Supreme Court in this case is reported in 237 Wis. 164, 295 N. W. 791. It is printed in the record, pp. 37-55.

JURISDICTION

The jurisdiction of this Court rests on sec. 237A of the Judicial Code (28 U. S. C. A., sec. 344 (a)).

STATEMENT OF THE CASE

The case is adequately stated in appellants' brief, pp. 2-8 with the following additions:

The stipulation with respect to jurisdiction of the National Board went no further than to state that the National Board would have jurisdiction in an employer unfair labor practice case if the National Board, pursuant to charges filed, if any were filed, assumed jurisdiction by issuing a complaint against the Allen-Bradley Company charging it with unfair labor practices under the Federal Act. The stipulation was as follows: (R. p. 36)

"Mr. Mann: I'll state on the record, if the Board please, that if the National Labor Relations Board, pursuant to charges filed, if any were filed, assumed the jurisdiction by issuing a complaint against the Allen-Bradley Company charging it with unfair labor practices under the federal act, that the company would concede the jurisdiction of the National Act to proceed in connection with such a complaint in so far as matters of interstate commerce are concerned. Doesn't that do what you want, Mr. Geline?"

"Mr. Geline: Yes, I think that is satisfactory."

The company's complaint, filed with the State Board, charged violations of sec. 111.06 (2), (a), (e), (f), (h) and (j) (R. 29-30) of the State Employment Peace Act. These violations all relate to employee unfair labor practices.

At the hearing before the State Board the appellants' objection was that by reason of the company's being engaged in interstate commerce "and that by reason thereof is subject exclusively to the provisions of the National Labor Relations Act * * * and to the exclusive jurisdiction of the National Labor Relations Board, and that the Wisconsin Employment Relations Board is without jurisdiction to proceed on the complaint filed under and pursuant to the provisions of the Wisconsin Employment Relations Act for the reason that said Act is in conflict with the National Labor Relations Act, and that the National Labor Relations Act is exclusive and permanent with respect to the matters set forth in the complainants' complaint". (R. 35)

The interlocutory order of the Board did not differ materially from the final order. It appears in the record on pp. 20-21.

With respect to the union, finding 10 of the Board appears to be inadvertently omitted in appellants' statement of the case (p. 5 of appellants' brief). This finding reads:

"That the Union, by its officers and many of its members, injured the person and property of employees of the company who desired to continue their employment with such company." (R, p. 14)

No question was ever raised as to the constitutionality of the Wisconsin Act itself. It was conceded to be a valid law. The challenge went to the application of the Act and not to the constitutionality of the Act itself. Appellants stated their position in their brief in the Supreme Court of the State as follows:

"The two issues on which this appeal is grounded are: first, whether the Wisconsin Act is constitution-

ally enforceable for any purpose to employees and unions engaged in an industry in interstate commerce and subject to the National Act; and, second, if the Court rules that the Wisconsin Act is applicable for some purposes, can it be so applied as to terminate the employee status of strikers in a manner which is in conflict with the National Act?

"This appeal in no manner challenges the constitutionality of the Wisconsin Act as to intrastate commerce. No such issue is presented in this case. All our arguments are predicated on the assumption that the Company is engaged in interstate commerce and subject to the National Act." (Appellants' brief in Supreme Court, pp. 8-9). See statement of Chief Justice Rosenberry in the opinion, R. 40-41.

No issue was raised in the Supreme Court of the State to the effect that the Federal Government in the National Labor Relations Act and related legislation has laid down a policy governing labor relations affecting interstate commerce to the exclusion of any state legislation dealing with precisely the same subject, even though entirely in harmony with and identical in language, purpose, intent and structure with the National Labor Relations Act (appellants' Point I).

Appellants stated their position in their brief in the Supreme Court of the State as follows:

"* * * We do not, in this appeal, attack the validity of the decision in *Fred Rueping Leather Co. v. Wisconsin Labor Relations Board*, 228 Wis. 475, ruling that the National Labor Relations Act had not preempted the field of labor relations, and that the Wisconsin Labor Relations Act of 1937 is equally applicable to parties engaged in interstate commerce and sub-

ject to the National Labor Relations Act. We assume, for purposes of appeal to this Court, that the state retains the right, based on its police powers, to enact a labor relations law which is consistent with the federal regulation of the same subject." (Appellants' brief, pp. 59-60)

ISSUES SOUGHT TO BE RAISED BY THIS APPEAL —DISPOSITION OF SUCH ISSUES BY THE COURT BELOW

Appellants apparently seek to raise four issues as follows:

(1) That the Federal Government in the enactment of the National Labor Relations Act and related legislation has laid down a policy governing labor relations affecting interstate commerce to the exclusion of any state legislation dealing with precisely the same subject, namely the subject of collective bargaining; (2) That the provisions of the Wisconsin Employment Peace Act are repugnant to and in conflict with the provisions of the National Labor Relations Act; (3) That the order of the Wisconsin Employment Relations Board upheld by the State courts is beyond the constitutional jurisdiction of the State Board; and (4) That the Wisconsin Employment Peace Act is an unconstitutional exercise of the police power of the State.

Issue (1) to the effect that the Federal Government has preempted the field of collective bargaining relations affecting interstate commerce to the exclusion of any state legislation dealing with precisely the same subject was not in issue in the Court below.

The second issue sought to be raised in this case was disposed of adversely to appellants' contention by the Court below upon the ground that the case presented no question of conflict with the provisions of the National Labor Relations Act.

The third and fourth issues sought to be raised are grounded upon the first and second. They were disposed of adversely to the appellants' contentions.

SUMMARY OF ARGUMENT

I.

The appellants are without standing to raise the issues sought to be raised. They seek to vindicate public rights without showing invasion of any of their own constitutional rights. The National Labor Relations Act is a public Act. It does not confer either private rights or remedies.

No claim is asserted that the National Labor Relations Act preempted the field of labor relations to a point where the State has lost its police power to deal effectively with conduct such as that involved in sec. 111.06 (a) and (f),—the only two sections of the Act upon which the order of the Board was based,—the only two sections of the Act applied to appellants in the case at bar. No claim is made that the appellants have any right to engage in conduct prohibited by the order of the Board in question. The sections of the Act involved in the case at bar and the order of the Board based thereon prohibit conduct which is unlawful conduct in any civilized society.

While it is asserted generally in the appellants' brief that the Employment Peace Act is unconstitutional upon its face, no such claim was ever asserted in the Court below. The appellants are accordingly precluded from making such assertions here. It was conceded in the Court below that

the Act was a constitutional law: The only claim ever asserted in the Court below was that the Act could not be constitutionally or validly applied if an employer's business was such as to subject him to the jurisdiction of the National Board. The most that was ever asserted in the Court below was a feared invalid application of a constitutional statute. That is the most that can be asserted here. The principles underlying, when constitutional issues or questions are presented to this Court, clearly establish that a litigant may not champion the constitutional rights of others when his own constitutional rights in the case under consideration are not affected; may not seek an advisory opinion and may not seek a declaratory judgment. A litigant may not challenge the constitutionality of a constitutional law in advance of an application of such legislation which can itself be challenged as an unconstitutional application.

II.

The appellants are precluded from asserting that the Federal Government in the National Labor Relations Act and related legislation has laid down a policy governing labor relations, affecting interstate commerce to the exclusion of *any* State legislation dealing with precisely the same subject as no such question was raised in the Court below. Not only was the point not raised, the point appellants now seek to make is directly contrary to the concession which they made in the Court below.

III.

In any event, the Federal Government in the enactment of the National Labor Relations Act has not preempted the field of labor relations affecting interstate commerce to the

exclusion of *any* state legislation dealing with precisely the same subject.*

The intent of Congress to preclude the exercise by the State of its police power which would be valid if not superseded by Federal action must be *clearly* manifested. The nature of the subject matter regulated by the National Labor Relations Act requires an *especially* clear showing of congressional intent to preempt. Any concept of the scope of the National Act such as appellants propose goes to the very essence of the relation between State and Federal government. The origin, scope and purpose of the National Act show no such intent. The cases applying the National Act do not disclose any such intent but rather disclose an intent to the contrary: The subject dealt with (labor) is one from which Congress by its legislation habitually does not exclude the states. In subject matter fields of similar or less import with respect to the essence of the relationship between State and Federal government, Congress uniformly enters the field without preempting and by legislation similar in method and structure to the National Labor Relations Act. The sort of remedy provided indicates the continuance of State power.

The National Labor Relations Act does not exclude the states from the field of labor relations "affecting commerce" until the National Labor Relations Board has entered an order concerning practices of a particular employer.

The pattern of all recent federal legislation and executive action reveals a general purpose to cooperate with, rather than to supplant, the states in socio-economic legislation. This Court has shown no disposition to adopt an attitude out of harmony with other departments of government. All of the recent decisions of this Court show a disposition to interpret the national constitution and statutes

*The argument upon this branch of the case is not concerned with conflicting state legislation of constitutional proportions.

to protect the states' legislative power against nullification by implication from congressional action or inaction. In view of the expansion of exercise of federal power, this has been a necessary trend if the federal system under the constitution is to be maintained.

The only criteria which appellants advance in support of their preempted field argument is that of the Congress having "occupied the field" and dealt with the "same subject"—the weakest kind of criteria and recognized as meaningless. No cases are cited in support of appellants' position except (1) *Hines v. Davidowitz*, 312 U. S. 52, 85 L. ed. 366, 61 S. Ct. 399 (1941)—clearly distinguishable; (2) National Labor Relations Board cases which do not remotely support the position taken; and (3) railroad cases. The inapplicability of early railroad cases as applied to a subject matter such as labor relations is apparent. This Court has recognized the inapplicability of such cases as applied to a cognate field "unfair competition".

The appellants' arguments are largely arguments which might be addressed to Congress as reasons why the Congress should preempt the field (if it has constitutional power to do so). They are not arguments which are of any relevancy in relation to the intent of Congress to preempt the field.

IV.

Appellants have no standing to raise any question of repugnance or conflict, but even if they have, there is no repugnance or conflict in the provisions of the Wisconsin Employment Peace Act with the National Labor Relations Act "so direct and positive" that the two acts cannot be reconciled or consistently stand together. The Act does not stand as an obstacle to full effectuation of the policy of the National Act. The underlying fallacy of appellants' argu-

ments upon this branch of the case (as upon all others) is that of (1) ignoring entirely the constitutional limitations upon congressional power to act and (2) the *limited* extent to which Congress did act in enacting the National Act. The National Act seeks to redress an inequality of bargaining power by forbidding *employers* to interfere with the development of employee organization, thereby removing one of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees. The National Act is concerned with and deals only with employer unfair labor practices. The National Board has jurisdiction only with respect to employer unfair labor practices. As to when an employer's unfair labor practices denounced by the Act do have such a close and substantial relation to interstate commerce as to tend to substantially burden and obstruct that commerce, the Congress deliberately left the solution of any such question to the National Labor Relations Board which the Act established.

The case at bar does not involve employer unfair labor practices. It deals with matters entirely outside the scope of the National Act and beyond the jurisdiction of the National Board. The appellants' objection that the National Labor Relations Board had exclusive jurisdiction over the unfair labor practices charged by the company, is without merit. That Board not only had no exclusive jurisdiction,—it had no jurisdiction. Appellants are without standing to raise any question of conflict or repugnance between the State and Federal Acts—no constitutional rights of appellants have been invaded. The constitutional approach to the question as to whether there is such a repugnance or conflict between the provisions of the two Acts so direct and positive that they cannot be reconciled or consistently stand together (if such question were presented, which it

is not) is just the opposite approach from that which appellants take in their analysis of the question.

The State Act does not discourage collective bargaining in labor relations affecting interstate commerce. The State redresses the inequality of bargaining power by forbidding employers to interfere with the development of employee organization and thereby seeks to remove one of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees to the full extent that the National Act protects against such practices. The Wisconsin Court recognizes that such is a major purpose of the Act and that it seeks to protect collective bargaining from employer unfair labor practices (the only practices against which the National Act protects collective bargaining) to the full extent and just as completely and effectively as does the National Act. The mere fact that the Wisconsin Act omits any positive declaration in favor of promoting collective bargaining, when it is recognized that a basic concept of the Act is to promote collective bargaining, hardly raises a conflict of constitutional proportions.

The difference between the definition of a labor dispute and that found in the Wisconsin Act is an immaterial difference. In nearly three years' administration of the State Act, no one has been able to find where the definition of a labor dispute in that Act is of any significance at all. The appellants misstate the import of sec. 111.06 (2) (e) as construed by the Supreme Court of the State, as well as the affect of the Act with respect to terminating employee rights under the Act. There is full scope for operation of the principle of the *Mackay Radio & Telegraph Co. case* under the State Act. The Wisconsin Court has specifically recognized such to be true, both in this case and in *Appleton Chair Corp. v. United Brotherhood, etc.*, 239 Wis. 333.

There is no conflict as to the rights of a minority union to bargain collectively (in the sense in which appellants use the term) with respect to wages, hours and working conditions for its members only. The situation is exactly the same under the State Act as under the National Act. Even if the situation were not exactly the same, the difference would not be one of constitutional proportions.

The appellants' argument upon the alleged conflict as to the appropriate bargaining unit is predicated upon an erroneous premise. The premise is that if the State sets up a craft unit and recognizes same, such unit is entitled to recognition under the State law, even though the National Board may set up an industrial unit as the exclusive bargaining unit. The Supreme Court in its opinion in this case specifically recognizes that any action taken by the National Board determining the appropriate unit is final and conclusive. The State Act merely lets the affected employees themselves determine appropriate collective bargaining units up to a point where the Federal government, acting pursuant to its superior authority and through its agency, determines that some other unit is a more appropriate collective bargaining unit than that established by the State law. Such situation presents no question of irreconcilable conflict of constitutional proportions.

Unless it can be said that the Congress, by enacting the National Act, has conferred upon employees the right to intimidate an employee in the enjoyment of his legal rights; the right to intimidate an employee's family; the right to picket the domicile of an employee; the right to injure the person or property of such employee or his family; the right to mass picket; the right to commit acts of violence; and so on, and so forth, and to do any and all of the things declared by the Employment Peace Act to be unfair labor practices, the unfair labor practices denounced as such by sec. 111.06 (2) and (3) (employee and third person unfair labor practices), there is no conflict of constitutional pro-

portions between the State Act and the National Act. The constitutional power of Congress to usurp the police power of the State to such an extent would be extremely doubtful. The National Act so interpreted would be of doubtful constitutionality. The conclusion is irresistible that Congress never intended to usurp the police power of the State to any such extent. The Congress either has or has not preempted the field. If it has preempted the field, the State police power is gone and it matters not in what form the police power is exerted. If the Congress has not preempted the field, the State may exercise its police power provided no undue or discriminatory burdens are put upon interstate commerce. No pretense is made that the Wisconsin Act places any undue or discriminatory burdens upon interstate commerce.

The appellants do not assert that the State police power is gone. They assert that the State may not exercise its police power through an administrative agency dealing with labor relations. If the State has police power, the matter of how that power should be exercised is entirely one within the legislature's range of choice.

The difference in definition of an employee is immaterial. This definition is of no significance in the administration of the Act. Finally it is asserted that sec. 111.07 (4) of the State Act, which permits the Board to suspend "rights, immunities, privileges or remedies granted or afforded by the Act" for not more than one year, is an irreconcilable difference. In the first place, the Board did not exercise any such power in the instant case. In the second place, the Board has never yet exercised this power. Under the circumstances, the appellants are without standing to raise the question of conflict. In the third place, there is no provision in the Act which by the mere force of its enactment presents any question of conflict.

Contrary to appellants' assertions, the Wisconsin Court has not held that the Board has power to suspend the bar-

gaining privileges of a union or of employees with respect to employers who, in a proper case, would be subject to the jurisdiction of the National Board. The Court held that no suspension of status for purposes of administering the Wisconsin Act had been exercised in the particular case and that for that reason no question of conflict was presented in the case at bar.

Judicial decisions with respect to the National Act have not established that the employee status of strikers for purposes of collective bargaining continues regardless of minor acts of disorder. The most the courts have held is that a National Board order of reinstatement with respect to such employees is within the discretionary power of the Board. This Court has never yet confirmed such a power in the National Board. In a cognate situation, *Nat'l. L. R. Bd. v. Fansteel Metal Corp.*, 306 U. S. 240, this Court held such an order of reinstatement to be beyond the power of the National Board. In any event the State Board has the same discretionary power with respect to reinstatement of such employees as the National Board. There is no question of conflict in this regard. The Board has ample power both by virtue of discretion committed to it, and sec. 111.17 and sec. 111.18 to so administer the State Act as never to present any serious questions of conflict with any national policy enunciated in the National Labor Relations Act. It cannot be presumed that the Board will abuse its discretion. It did not do so in the instant case. It will be time enough to deal with any abuse of discretion when a case arises presenting the abuse.

V.

The order of the Wisconsin Employment Relations Board, upheld by the state courts, was not beyond the jurisdiction of the state board. The appellants' entire argument

contra is grounded upon a so-called irreconcilable conflict between the State Act and the National Act because of the limited discretionary power vested in the Board by sec. 111.07 (4) to suspend rights, immunities, privileges or remedies granted or afforded by the Act for not more than one year.

The appellants admit that the conflicts between the two Acts boil down to one essential point. That point is asserted to be that the State Act *requires*, as a penalty, employees who have violated local police laws to forego collective bargaining privileges and rights. The State Act requires no such penalty. The conflicts are accordingly boiled down to nothing.

The concept that this particular provision of the Act goes to the jurisdiction of the Board is a new concept of jurisdiction. The Board obviously had jurisdiction. The only question that could be presented was whether, in relation to this particular controversy, the Board could exercise any discretion granted by this particular clause of the Act. That question would not go to the jurisdiction of the Board. It would simply go to the *power* of the Board to exercise any discretion under this particular clause under the facts of the instant case.

It is inaccurate to state that Board action under this clause deprives the individuals of their employee status for the purposes of collective bargaining. The employees would not by such suspension lose collective bargaining rights. They would lose protection of the Wisconsin Act. The appellants seek, in this case, to establish that the National Act preempts the field. They want no protection except the protection of the National Act. Board suspension of rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act, would give the appellants just what they want,—the Federal Act as their sole protection.

VI.

The Wisconsin Employment Peace Act is not an unconstitutional exercise of the police power of the state. The appellants' argument contra seeks to have the entire Act declared unconstitutional, in spite of the express provisions of sec. 111.17 and sec. 111.18, if any provision of the Act cannot be applied to all situations that may arise. The appellants are precluded from arguing any such question. They never challenged the validity of the Wisconsin Act as an Act. The closest that appellants have ever come to raising any question is a feared invalid application of a concededly constitutional statute. Appellants' contention is in any event without merit.

ARGUMENT

POINT I

THIS APPEAL DOES NOT PRESENT THE ISSUES
SOUGHT TO BE RAISED.

A. The appellants are without standing to raise the issues sought to be raised—they seek to vindicate public rights without showing invasion of any of their own constitutional rights.

The National Labor Relations Act is a public Act. It does not confer either private rights or remedies. Thus in *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 84 L. ed. 738 (1940) it was held that the National Act merely recognizes a natural right,—the right of labor to organize and bargain collectively; that the Act denounces certain unfair labor practices of employers which interfere with the free exercise of such right; sets up an

administrative agency with exclusive powers to administer the Act and with limited power to prevent such practices and grant remedial relief insofar as such unfair labor practices of employers denounced by the Act tend to substantially burden and obstruct interstate commerce. The case further holds that the Act is a public Act and that no private rights are conferred thereby. See also *National Licorice Co. v. Nat'l. L. Rel. Bd.*, 309 U. S. 350, 84 L. ed. 799, 60 S. Ct. 569 (1940).

The whole tenor of appellants' argument is that of vindication of what appellants conceive to be a national policy with respect to labor relations and without showing in anywise wherein any constitutional right of their own has been invaded. It goes without saying that appellants are not the guardians and protectors of a supposed federal policy with respect to labor relations affecting interstate commerce and that they must show invasion of some constitutional right of their own by the state statute as construed and applied to them before they are entitled to raise the issues sought to be raised by this appeal.

As the National Act confers no private right or remedy, it is most difficult to see wherein any constitutional right of appellants under the National Act is or can be invaded by the Wisconsin Act and particularly by the sections of the Act which have been applied to them which are involved in the order of the Board, namely sec. 111.06 (2), (a) and (f), which read as follows:

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket

his domicile, or injure the person or property of such employe or his family.

• • •

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The principles underlying when constitutional issues or questions are presented to this Court were reviewed by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345, 80 L. ed. 688, 710, 56 S. Ct. 466 (1936) from which we quote.

"The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. On this ground it has in recent years ordered the dismissal of several suits challenging the constitutionality of important acts of Congress. In *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162, 66 L. ed. 531, 537, 42 S. Ct. 261, the validity of titles III. and IV. of the Transportation Act of 1920. In *New Jersey v. Sargent*, 269 U. S. 328, 70 L. ed. 289, 46 S. Ct. 122, the validity of parts of the Federal Water Power Act. In *Arizona v. California*, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522, the validity of the Boulder Canyon Project Act. Compare *United States v. West Virginia*, 295 U. S.

463, 79 L. ed. 1546, 55 S. Ct. 789, involving the Federal Water Power Act, and *Liberty Warehouse Co. v. Gran-
nis*, 273 U. S. 70, 71 L. ed. 541, 47 S. Ct. 282, where
this Court affirmed the dismissal of a suit to test the
validity of a Kentucky statute concerning the sale of
tobacco; also *Massachusetts State Grange v. Benton*,
272 U. S. 525, 71 L. ed. 387, 47 S. Ct. 189." (p. 710)

The fifth principle laid down was as follows:

"The Court will not pass upon the validity of
a statute upon complaint of one who fails to show
that he is injured by its operation. *Tyler v. Judges of
Ct. of Registration*, 179 U. S. 405, 45 L. ed. 252, 21 S.
Ct. 206; *Hendrick v. Maryland*, 235 U. S. 610, 621, 51
L. ed. 385, 390, 35 S. Ct. 140. Among the many appli-
cations of this rule, none is more striking than the
denial of the right of challenge to one who lacks a
personal or property right. Thus, the challenge by a
public official interested only in the performance of
his official duty will not be entertained. *Columbus &
G. R. Co. v. Miller*, 283 U. S. 96, 99, 100, 75 L. ed. 861,
865, 866, 51 S. Ct. 392. In *Fairchild v. Hughes*, 258
U. S. 126, 66 L. ed. 499, 42 S. Ct. 274, the Court affirmed
the dismissal of a suit brought by a citizen who sought
to have the Nineteenth Amendment declared uncon-
stitutional. In *Massachusetts v. Mellon*, 262 U. S. 447,
67 L. ed. 1078, 43 S. Ct. 597, the challenge of the fed-
eral Maternity Act was not entertained although made
by the Commonwealth on behalf of all its citizens."

This principle would seem to be peculiarly applicable
to the case at bar. What personal or property right is
sought to be vindicated by the appellants in the instant
case? As the National Labor Relations Act conferred no
personal or property right upon appellants it would seem

apparent that what appellants seek to do is to vindicate public rights with no personal or property right involved.

No claim is asserted that the National Labor Relations Act preempted the field of labor relations to a point where the State has lost its police power to deal effectively with conduct such as that involved in sec. 111.06 (a) and (f),—the only two sections of the Act upon which the order of the Board was based,—the only two sections of the Act applied to appellants in the case at bar. No claim is made that the appellants have any right to engage in conduct prohibited by the order of the Board in question. No such claim could be successfully asserted. The sections of the Act involved in the case at bar and the order of the Board based thereon prohibit conduct which are acts of clear wrong doing. They are acts which constitute violations of law in any society. They are acts, the commission of which in the long run are not in the best interests of the country or of labor itself. They are acts against which concededly the National Act affords no remedy. Such being true, it is obvious that the appellants are seeking to champion the alleged constitutional rights of others without any showing as to wherein their own alleged constitutional rights have been invaded.

While it is asserted generally in the appellants' brief that the Employment Peace Act is unconstitutional on its face, no such claim was ever asserted in the Court below. It was conceded that the Act was a constitutional law. The only claim ever asserted in the Court below was that the Act could not be constitutionally or validly applied if an employer's business was such as to subject him to the jurisdiction of the National Board. The most that was asserted in the Court below was a feared invalid application of a

constitutional statute. The most that can be asserted here is a feared invalid application of a constitutional statute. The case at bar does not present any invalid application of a constitutional statute. It would accordingly seem quite apparent that appellants are wholly without standing to raise the issues sought to be raised. We know of no instance where this court has permitted a constitutional challenge to constitutional legislation in advance of an application of such legislation which can itself be challenged as an unconstitutional application. The Court does not sit to render advisory opinions or declaratory judgments.

B. The law upon the subject as to when litigants may raise constitutional issues.

No principle of law is more firmly established than the one that a litigant may not champion the constitutional rights of others when his own constitutional rights in a case under consideration are not affected.

In *Lehon v. City of Atlanta*, 242 U. S. 53, 56, 61 L. ed. 145 (1916), the Court said:

“* * * To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval.”

In *Hicklin v. Coney*, 290 U. S. 169, 78 L. ed. 247, 250 (1933) the Court said:

“Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court

in saying that the Commission had never exercised such a power, 'if any it has under the act,' and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions. *Stephenson v. Binford*, supra (287 U. S. 251, 277, 77 L. ed. 301, 53 S. Ct. 181, 87 A.L.R. 721)."

In *Stephenson v. Binford*, 287 U. S. 251, 77 L. ed. 288, 301 (1932) the Court said:

"The provision of Sec. 13, requiring every motor carrier, whether operating under permit or certificate, to furnish a bond and policy of insurance conditioned that the obligor will pay, among other things, for loss of, or injury to, property arising out of the actual operation of the carrier, is construed by appellants as including cargoes carried by them, and is assailed as a requirement bearing no relation to public safety, but as an attempt to condition the purely private contractual relationship between shipper and private carrier. It is said that the proviso which prohibits the commission from requiring insurance covering loss of, or damage to, cargo in an excessive amount requires the construction suggested. So far as appears no attempt yet has been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain. Moreover, no state court thus far has dealt with the question, and unless obliged to do otherwise, we should not adopt a construction which might render the provision of doubtful validity, but await a determination of the matter by the courts of the state. *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 186, 76 L. ed. 1038, 1049, 52 S. Ct. 548."

In *Bandini Petroleum Co. v. Superior Ct.*, 284 U. S. 8, 76 L. ed. 136, 145 (1931) the Court said:

"* * * It is not necessary to go further and to deal with contentions not suitably raised by the record before us. Constitutional questions are not to be dealt with abstractly. * * *

"* * * If the assailed provisions as construed and applied in the present case afford due process, appellants cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants. * * *" *Atlantic Coast Line R. Co. v. Ford*, 287 U. S. 502, 77 L. ed. 457, 460 (1933).

"* * * Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press v. Nat'l. L. Rel. Bd.*, 301 U. S. 103, 81 L. ed. 953, 960 (1937).

In *Henneford v. Silas Mason Co.*, 300 U. S. 577, 583, 81 L. ed. 814, 819 (1937), a Washington tax upon use of personal property was challenged as unconstitutional. It was argued that the definition of "use" in the rules of the Commission was such as to make the tax in effect a sales tax and subject to the same objections as a sales tax. The Court, through Justice Cardozo, said:

"* * * If the rules are too drastic in that respect or others, the defect is unimportant in relation to this case. Here the machinery and other chattles subjected to the tax have had continuous use in Washington long after the time when delivery was over. The plaintiffs are not the champions of any rights except their own." (p. 583)

In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 81 L. ed. 1193, 1203 (1937) it was urged that

a State tax on general stores constituted an interference with interstate commerce because the statute permitted the supervisor of public accounts to include mail order houses, order stations and department stores in making a computation with respect to the plaintiff's retail business. In relation to this argument the Court said: (p. 1203)

"* * * For all that appears neither its mail order houses, nor its order stations, nor its department stores, will be included in the computation.

* "It is manifest that Montgomery Ward & Company cannot upon mere supposition that the Act will be unconstitutionally construed and applied in respect of its five stores in Louisiana obtain an advisory decree that the Act must not be so administered as to burden or regulate interstate commerce."

The Court cited among other cases *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 80 L. ed. 688, 710, 56 S. Ct. 466 (1936).

In *Utah Power & Light Co. v. Pfof*, 286 U. S. 165, 76 L. ed. 1038, 1049 the Court said:

"* * * It does not appear that appellant is presently in any such danger of an unconstitutional application of these provisions of the statute as to entitle it to invoke a decision here upon the question, and the rule is well settled that 'a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage.' *Dahnke-Walker Mill. Co. v. Bondurant*, 257 U. S. 282, 289, 66 L. ed. 239, 243, 42 S. Ct. 106; *Oliver Iron Min. Co. v. Lord*, supra (262 U. S. pp. 180, 181, 67 L. ed. 936, 937, 43 S. Ct. 526); *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 S. Ct. 167, 7 N. C. C. A. 570; *Gorieb v. Fox*, 274

U. S. 603, 606, 71 L. ed. 1228, 1230, 53 A. L. R. 1210, 47 S. Ct. 675. Primarily, the construction of these provisions of the statute is for the state supreme court, and we cannot assume in advance that such a construction will be adopted, or such an application made of the provisions, as to render them obnoxious to the federal Constitution. * * *

In *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. ed. 243, 61 S. Ct. 291, 306 (1940) the Court said: (S. Ct.)

"The briefs and arguments at the bar have marshaled reasons and precedents to cover the wide range of possible disagreement between Nation and state in the functioning of the Federal Power Act. To pre-determine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. * * *

In *Voeller et al. v. Neilston Warehouse Co. et al.*, 311 U. S. 531, 61 S. Ct. 376, 378, 85 L. ed. 322 (1941) the Court said: (S. Ct.)

"* * * Exercising the very delicate responsibility of passing upon the validity of state statutes, this court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions. * * *

Citing cases including the concurring opinion of Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347, 348, 56 S. Ct. 466, 483, 80 L. ed. 688.

In *Watson et al. v. Buck et al.*, 313 U. S. 387, 85 L. ed. 1416, 61 S. Ct. 962 (1941) the Court gave excellent reasons why it should refrain from passing on all contingencies of attempted enforcement of a statute until faced with cases involving particular provisions, as specifically applied to persons who claimed to be injured. The Court said:

"* * * Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. * * *

The judicial power under Article III of the Constitution of the United States extends only to that of deciding actual "cases" or "controversies" that are ripe for judicial determination. It does not extend to that of rendering an advisory opinion or declaratory judgment with respect to hypothetical cases.

See: *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 71 L. ed. 541, 47 S. Ct. 282 (1927);

Rochester Tel. Corp. v. United States, 307 U. S. 125, 83 L. ed. 1147, 59 S. Ct. 754 (1939).

See also opinion of Justice Frankfurter in *Coleman v. Miller*, 307 U. S. 433, 83 L. ed. 1385, 59 S. Ct. 972, 122 A. L. R. 695 (1939).

The case at bar involves nothing more than the posing of hypothetical situations,—it poses nothing more than feared invalid applications of the manifold provisions of a constitutional statute. No constitutional right of the appellants has been invaded.

POINT II

THE APPELLANTS ARE PRECLUDED FROM ASSERTING THAT THE FEDERAL GOVERNMENT IN THE NATIONAL LABOR RELATIONS ACT AND RELATED LEGISLATION HAS LAID DOWN A POLICY GOVERNING LABOR RELATIONS AFFECTING INTERSTATE COMMERCE TO THE EXCLUSION OF ANY STATE LEGISLATION DEALING WITH PRECISELY THE SAME SUBJECT AS NO SUCH QUESTION WAS RAISED IN THE COURT BELOW.

In presenting this case to the Supreme Court of the State the appellants contended the validity of the principle of *Wis. L. R. Bd. v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673 (1938), which dealt with the exact point which appellants deal with in POINT I of their argument. That case decided the point adversely to the contention which appellants now make in this Court. It is elementary that any such point, not raised in the Court below, cannot be raised for the first time in this Court. *McGoldrick, etc. v. Compagnie Generale Transatlantique*, 309 U. S. 430, 84 L. ed. 849, 60 S. Ct. 670 (Mar. 25, 1940).

Furthermore the question of whether states may pass "Little Wagner Acts" which have the same objective, have similar provisions and which are alike in structure to the National Labor Relations Act and under such Acts assume jurisdiction of employer unfair labor practice cases, in those situations where the National Board might take jurisdiction if it decided to do so, is not involved in the instant case. There could be no possible merit to the appellants' contention at the opening of the hearing before the Board that the National Labor Relations Board had exclusive jurisdiction. It had no jurisdiction. The National Board

has jurisdiction only with respect to employer unfair labor practices. It has none with respect to employee and third person unfair labor practices. The case does not involve any question of exclusive jurisdiction or any question of conflicting jurisdiction.

POINT III

IN ANY EVENT THE FEDERAL GOVERNMENT IN THE ENACTMENT OF THE NATIONAL LABOR RELATIONS ACT HAS NOT PREEMPTED THE FIELD OF LABOR RELATIONS AFFECTING INTERSTATE COMMERCE TO THE EXCLUSION OF STATE LEGISLATION DEALING WITH PRECISELY THE SAME SUBJECT.

- A. The intent of Congress to preclude the exercise by the State of its police power which would be valid if not superseded by federal action must be clearly manifested—all doubts concerning the validity of State "Little Wagner Acts" and the jurisdiction of State boards, as applied to situations where the National Board might conceivably act but has not acted, must be resolved in favor of such State Acts and State Board jurisdiction to act.

It is settled doctrine that "the intention of Congress to exclude states from exercising their police power must be clearly manifested. *Reid v. Colorado*, 187 U. S. 137, 148; *Savage v. Jones*, 225 U. S. 501, 533." Brandeis, J. in *Napier v. Atlantic Coast Line*, 272 U. S. 605, 611 (1926). See also *Mintz v. Baldwin*, 289 U. S. 346, 350 (1932); *Carey v. South Dakota*, 250 U. S. 118, 63 L. ed. 886, 39 S. Ct. 403 (1919); *Kelly v. Washington*, 302 U. S. 1, 82 L. ed. 3, 58 S. Ct. 87 (1937).

1. The nature of the subject matter regulated by the National Labor Relations Act requires an especially clear showing of congressional intent to preempt.

The danger of invalidating State legislation when Congress has not clearly indicated such to be its intention is especially serious in view of the subject matter of the National Labor Relations Act. The subject of labor relations is primarily local in its nature and remains so despite the recent recognition of the power of Congress to regulate some of its incidents.

The mere suggestion of congressional intent to exclude State legislation dealing with the same subject proposes a very startling and extensive broadening of the concept of interstate commerce, one indeed that virtually destroys the police power of the states. If the Congress deemed that the National Labor Relations Act could be made to function effectively as an instrument of peace in the field of labor relations and thus prevent burdens and obstructions to interstate commerce, for like reason it would seem that the legislatures of the States might be of a similar view as to the effectiveness of like State legislation in the exercise of their police powers under the 10th Amendment. After all, preservation of the peace and enforcement of law and order is a primary function of State Government.

"It cannot have been supposed that the cases deemed by the board so importantly to affect interstate commerce as to warrant intervention or with which the board had time to deal would include all of the cases which the states might need to deal with in the interests of local peace and good order. It cannot have been intended to 'paralyze the efforts of a

state to protect her people against impending calamity and commit the matter to the exclusive discretion of a distant and overworked federal agency."

Wisconsin L. R. Bd. v. Fred Rueping L. Co., 228 Wis. 473, 491, 279 N. W. 673 (1938).

Any concept of the scope of the National Act such as appellants propose involves political and economic issues going to the very essence of the relation between Federal and State governments. The language in the case of *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837 (1935); *United States v. Butler*, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312 (1936), *Carter v. Carter Coal Co.*, (Guffey-Snyder Coal Act) 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855 (1936), and *Nat'l L. R. Bd. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 (1937) is electric with the problem. If and when Congress should see fit to declare clearly its intent that the states be ousted from jurisdiction in such cases, it will be time enough for the constitutional issue of the limitation of national powers by states' rights to be fought out. The Congress has not manifested any such intent.

2. The language of the National Act shows no such intent.

Admittedly the exercise of its power by Congress in this case is not such as *necessarily* to exclude the state action under consideration. It would have been easy for Congress to provide clear language that to the extent of the application of the National Act no state action should be valid. See, for example, *Minneapolis, St. Paul & Sault*

Ste. Marie Ry. Co. v. Railroad Comm., 183 Wis. 47, 197 N. W. 352 (1924). The statute in that case, sec. 20a of the Transportation Act of Feb. 28, 1920, ch. 91, 41 Stats. 470, provided as follows:

"(2) It shall be unlawful for any carrier to issue . . . any evidence of indebtedness . . . even though permitted by the authority creating the carrier corporation . . .

(7) The jurisdiction conferred upon the commission by this section *shall be exclusive and plenary*, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." (Italics ours)

It was properly held that this language showed an intent to invalidate state legislation requiring approval of the State Railroad Commission in addition to approval by the Federal Interstate Commerce Commission. This conclusion was fortified by a careful examination of the circumstances surrounding the enactment of the Federal requirement.

The circumstances surrounding the enactment of the National Labor Relations Act require an especially clear showing of intent by Congress to exclude state legislation. It is reasonable to suppose that in view of the very serious consequences of invalidating such State acts, Congress would have used language leaving no room for doubt. Yet the wording of the National Act does not contain a single express reference to state action.

Section 10 (a) reads as follows:

"Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engag-

ing in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.* (Italics ours)

Section 10 (a) must be read in its context. *Carey v. South Dakota*, 250 U. S. 118, 122, 63 L. ed. 886 (1919). It must be taken in conjunction with other sections of the National Act, particularly Sections 14 and 8 (3).

"Sec. 14. Whenever the application of the provisions of Section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, section 707 (a)), as amended from time to time, or of sec. 77B, paragraphs (1) and (m) of the Act approved June 7, 1934, entitled 'An Act to Amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898, and Acts amendatory thereof and supplementary thereto' (48 Stat. 922, pars. (1) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect."

Section 8 (3) provides as follows:

"By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, that nothing in this Act or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from

time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . .”

Section 14 and the proviso in section 8 (3) relate solely to statutes of Congress. When read together with these sections, the purpose of section 10 (a), becomes quite clear, namely, to exclude other federal agencies, judicial or administrative, from acting on the subject of unfair labor practices affecting commerce. *Myers, et al. v. Bethlehem Ship Building Corporation*, 58 S. Ct. 459 (1938), *Newport News Ship Building Corp. v. Schauffler*, 58 S. Ct. 466 (1938).

In the *Myers* case, the question was whether a federal District Court has equity jurisdiction to enjoin the National Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C.A. sec. 151 et seq. In holding that the federal District Court had no such jurisdiction, the court said (at page 463):

“It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And, if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted. Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdic-

tion in the Board and the Circuit Court of Appeals."
(Italics ours)

• This case illustrates the purpose for which the word "exclusive" was inserted in the National Act, and supports the conclusion that it was not intended to refer to state legislation. By the application of the doctrine "*expressio unius est exclusio alterius*," it would seem to follow that by excluding other federal agencies without mentioning state agencies, Congress intended no limitation on state legislation or action.

Referring to the import of sec. 10 (a) the Wisconsin Court in the *Rueping* case, *supra*, correctly concluded: (p. 483)

"* * * This section purports to deal not with the scope of the act, but with the powers and jurisdiction of the National Labor Relations Board with respect to its administration. * * *"

3. The origin, purpose, and scope of the National Act shows no such intent.

Sec. 7 (a), part of the N. I. R. A. (Act of June 16, 1933, 48 Stat. 198) went down with the invalidation of that Act in the *Schechter* case, 295 U. S. 495 (1935). The sole problem under 7 (a) was to prevent a gap, through cooperative legislation and action, even though the National and State acts and agencies might overlap. See Lorwin and Wubnig, *Labor Relations Boards* (1935) pp. 28-45. In interpreting Sec. 7 (a), the National Labor Board and the old National Labor Relations Board established certain rules to add detail to the broad language of the Act. Some of these rules dealt with

more or less specific practices of employers, which were later translated into the provisions of the present National Labor Relations Act under the description of "unfair labor practices." (Section 8).

Nothing in the debates of Congress concerning the National Labor Relations Act or other official records shows that Congress was concerned with excluding the states from acting. In the first place, there was no State legislation of the same character yet in existence. The earliest of the first five State acts (Mass., N. Y., Pa., Utah, Wis.) was the Utah Act of 1937 (Ch. 55, Session Laws of Utah, 1937). In the second place, it is a matter of common knowledge that the chief concern of lawyers and legislators alike was the power of Congress to act at all in the sphere of labor relations.

"* * * in enacting the National Labor Relations Act, congress was entering a new and uncharted field, one in which the boundaries of any competency it might have were extremely doubtful. It was already occupied at least in part by state laws passed in exercise of the police power to preserve local peace and good order. What was doubtful at the time of enactment with reference to the boundaries of the power continues to be doubtful. * * *" *Wis. L. R. Bd. v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673.

Determination of the scope and extent of the power of Congress is left to individual cases as they arise. *Santa Cruz Packing Co. v. Nat'l. L. R. Bd.*, 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656 (1938).

As was said by the Wisconsin Court in the *Rueping* case:

"It seems to us a violent assumption that in dealing with a subject in which the limitations on its power

were and are so uncertain as to require determination by such a process congress could have intended to exclude state legislation in the field, except so far as it conflicted with the federal act. If it did so intend, then the prediction may safely be made that as a practical matter jurisdictional doubts will for years preclude effective administration either by the state or national governments. * * *

In the third place, the sole concern of the legislators on the subject of exclusiveness was the elimination of the great variety of *federal labor boards* which had grown up in administering Section 7 (a) of the N.I.R.A. Thus the 74th Congress discussed ways and means to consolidate and further the improvement in industrial relations made under 7 (a) through the machinery of collective bargaining. For example, the statement of Senator Robert F. Wagner, sponsor of the Senate bill (70 Cong. Record, Part 7, P. 7569, 74th Cong. 1st Sess.):

"Weak as it is, the present National Labor Relations Board has been subjected, in addition to the corroding influence of various industrial boards, dealing according to their own lights in the same subject matter, at present from 13 to 15 boards have been established to handle 7 (a) cases, and *over none of these has the national board jurisdiction, either as to fact or as to law.* Since there are now over 100 codes which provide for the establishment of industrial boards, there exists the constant threat that dispersion of authority will transcend all reasonable bounds." (Italics ours).

The same concern with conflicting *federal boards*, and lack of concern over possible overlapping state action, is found in the United States Senate Report (74th Cong. 1st

Sess., Senate Report 573) on the Senate bill (S. 1958), which report was presented on May 2, 1935:

"Today a wide variety of independent boards, from 13 to 15 in number, are entrusted with the administration of section 7 (a). There are now over a hundred codes which made some provisions for the creation of such boards."

4. The administration of the National Act shows no such intent.

In *Mintz v. Baldwin*, *Com'r. of Agri. and Markets of New York*, 289 U. S. 346, 77 L. ed. 1245, 53 S. Ct. 611, (1932) involving an alleged conflict between the Cattle Contagious Disease Acts of Congress of 1903 and 1905 (Feb. 2, 1903, 32 Stat. 791, 21 U. S. C., secs. 111, 120-122; March 3, 1905, 33 Stat. 1264, 18 U. S. C., sec. 118, 21 U. S. C., secs. 123-127; both acts amended by the Act of February 7, 1928, 45 Stat. 59)—and an order of the Commissioner of Agriculture and Markets of New York, made pursuant to Secs. 72 and 74 of the New York Agriculture and Markets Law, Mr. Justice Butler, speaking for the Court, stated (p. 351):

"* * * Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures * * *

In the Board's brief in the *Rueping* case it was stated: (p. 32) ~

"The record shows knowledge and complete acquiescence of the National Board in the enforcement of the state Act to suppress appellant's unfair labor

practices. The National Board has been fully informed of the proceedings in this case almost if not quite from their inception. Mr. Philip Levy, then a member of the legal staff of the National Board, represented the latter as an observer at the oral argument in the court below. At no time has the National Board ever indicated opposition to the Wisconsin Board's exercise of jurisdiction in this or any similar case, but its attitude has been quite the contrary."

In the *Rueping* case the Board presented a statistical analysis of the State and Federal Board's cooperation in handling cases which the National Board had jurisdiction to handle had it desired to do so. The Supreme Court of the State takes judicial notice of the records of governmental agencies. *Wis. Power & Light Co. v. Beloit*, 215 Wis. 439, 444, 254 N. W. 119 (1934).

The Board further stated in its brief in that case: (p. 35)

"In addition to the cooperation revealed by the statistical analysis above, there have been repeated conferences between representatives of the state Board and the regional office of the National Board in Milwaukee, and two conferences in Washington, one in April, 1937 and another in November, 1937, between the members of both boards and their legal staffs concerning practical matters of administration. See the reply of Mr. Charles Fahy set forth in the Appellant's Brief, Appendix B, at pp. 121-122. It is not necessary for the court to rely on the statement of counsel for the respondent as to the result of these conferences. The fact is, as shown by the records of both Boards, that the state Board, both before and since those conferences, has frequently exercised jurisdiction over unfair labor practices parallel to and including the

case at bar, with the knowledge and acquiescence of the National Board."

Like cooperation and like acquiescence are shown by the National Board in the administration of the New York Act. *Davega City Radio Incorp. v. N. Y. Labor Bd.*, 281 N. Y. 13, 22 N. E. (2) 145 (1939).

The Wisconsin State Federation of Labor (A.F. of L.) and the New York State Labor Board filed briefs as amici curiae in the Supreme Court of the State of Wisconsin in the *Rueping* case, supporting the position of the State Board in that case.

5. The cases applying the National Act do not disclose any such intention.

We have found no case considering either the scope of the National Act or the scope of the Board's power which has ever even intimated that the National Act preempted the field of labor relations. The following quotation from *Consolidated Edison Co. v. Nat'l. L. R. Bd.*, 305 U.S. 197, 83 L. ed. 126, 127 (1938) is most pertinent:

"* * * It is manifest that the enactment of this state law (New York Labor Relations Law) could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority. But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten

interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances including the bearing and effect of any protective action to the same end already taken under state authority. *The justification for the exercise of federal power should clearly appear.* Florida v. United States, 282 U. S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119. But the question in such a case would relate not to the existence of the federal power but to *the propriety of its exercise on a given state of facts.*" (Italics ours).

6. The nature of the National Act indicates that it does not exclude the states from the field it covers—circumstantial evidence of congressional intent.

"In the absence of express statement, the Court will look to the nature of the subject matter as evidence of congressional intent," Grant, Scope and Nature of Concurrent Power, 34 Col. L. Rev. 995, 1040 (1934). We now consider this circumstantial evidence of congressional intent.

- a. The subject dealt with is one from which Congress by its legislation habitually does not exclude the states.

(1) Labor.

Before the enactment of the National Industrial Recovery Act in 1933, the regulation of labor except in government works, the railroad industry, and the shipping industry (under the admiralty power) was generally in the hands of the states.

In Wisconsin, Title XIII of the Statutes treats of the Regulation of Industry. Most of this title is of long standing. Chapter 101 deals with the structure and functions of the Industrial Commission and imposes "safe place" regulations. Chapter 102 is the Workmen's Compensation Act. Chapter 103, Employment Regulation, includes maximum hours for women and children, as well as the Labor Code of 1931. Chapter 104 is the Minimum Wage Law for women and children. Chapter 105 deals with Employment Agents; Chapter 106 with Master and Apprentices; Chapter 107, with Mining and Smelting; Chapter 108 (created in 1933) with Unemployment Compensation; Chapter 109, with State Inspection.

None of the above chapters or sections, either in their language or administration has ever exempted as a class, manufacturers or employers engaged in interstate commerce, or persons whose industrial practices affect interstate commerce. In each case the legislature has outlined a complete scheme, applicable to all employers within Wisconsin, with a few express exceptions which are easily explainable.

In contrast with the Wisconsin scheme just outlined, up to 1933 national labor legislation had been very piecemeal, except with regard to government work and railroad and maritime transportation. Such legislation as Congress

has passed shows no intent to exclude the states from acting, nor has this Court inferred such an intent from the mere exercise of congressional power. *The chief concern of Congress in the field of employer-employee relations has been with the question of whether Congress itself had the power to act, and not whether the states should be excluded.* Moreover in every case where Congress has attempted to legislate in this field, this Court has considered the right of the states to act as extremely important, in many cases so important as to require that Congress itself do not act.

- *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495 (1935)
- Carter v. Carter Coal Co.*, 298 U. S. 238 (1935)
- R. R. Retirement Board v. Alton Railway Co.*, 295 U. S. 330, 362 (1934)

The Federal Child Labor Acts, ultimately held unconstitutional (See *Hammer v. Dagenhart*, 247 U. S. 251 (1918) holding Congress could not prohibit the transportation of child-made goods; *Child Labor Tax Cases*, 259 U. S. 20 (1922), holding invalid a tax imposed on goods manufactured by child labor) were never held to exclude state legislation, though none of them expressly saved state legislation. On the other hand Congress has deliberately passed legislation in the field of labor relations in aid of state legislation, such as the Hawes-Cooper Act of 1929 (45 U. S. Stat. 1084), permitting states to prohibit the importation of prison-made goods, upheld in *Whitfield v. Ohio*, 297 U. S. 431 (1936); the Ashhurst-Summers Act of 1933 (49 U. S. Stats. 494), prohibiting their shipment to states so prohibiting them, upheld in *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334 (1936);

and the Social Security Act (1936, 49 U. S. Stats. 620) whereby Congress supplements state laws relating to unemployment compensation and old age benefits. *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937). *Helvering v. Davis*, 301 U. S. 619 (1937). Such in general is the pattern of the minimum wages and maximum hours bill.

In this situation Congress enacted the National Labor Relations Act. Constitutional doubts as to its validity were settled by the numerous decisions of this Court in 1937, but in not one of those decisions is there an intimidation that the states are excluded by it from action in the same field. Nor is there the slightest suggestion in the subsequent decisions of this Court applying to the Wisconsin Labor Code, that the National Labor Relations Act has at all detracted from its full operation.

Senn v. Tile Layers Union, 301 U. S. 468 (1937);

Lauf v. E. G. Shinner & Co., 303 U. S. 323, 82 L. ed. 872, 58 S. Ct. 578 (1938).

(2) Trade practices.

It is not only in labor relations that Congress has regulated industry without inferentially curtailing states' rights. The repression of harmful commercial practices has frequently received its attention without limiting the states' freedom to repress the same evils.

A type of business practice which has been the subject of Federal prohibition is competition by unfair methods, to prevent which the Federal Trade Commission was created in 1913. Though later National legislation expressly saved State legislative power with respect to retail price

maintenance, Miller-Tydings Act of August 17, 1937, c. 690, Tit. VIII, 50 Stat. 693, this Federal Trade Commission Act of 1913, like the Sherman Act (which the Miller-Tydings Act amends, 15 U.S.C.A. sec. 1) and the Clayton Act, contains no reference to State legislation in the same field. Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. sec. 45.

Whatever doubt existed as to the permissible extent of the operation of State laws laying down a policy *contrary* to the Federal Trade Commission Act, the Act has never been construed to keep the states from regulation of trade practices not in fact conflicting with the federal regulation. That it was wrong in the eyes of the United States to use unfair methods of competition in interstate commerce, did not mean that the states could not make laws concerning the same reprehensible practices and set up special agencies to combat them.

The Federal Trade Commission Act does not "occupy the field" to the exclusion of the states. *Federal Trade Comm. v. Bunte Bros.*, 312 U. S. 349, 85 L. ed. 881, 61 S. Ct. 580 (1941).

There has been much state legislation. Wis. Stat. sec. 100.18-100.22. *Kryl v. Frank Holton & Co.*, 217 Wis. 628 (1935). *Handler, Unfair Competition* (1936) 21 Iowa L. Rev. 175, 229-236. Yet the cases enforcing this legislation do not indicate that the existence of the Federal Trade Commission has the slightest effect in limiting its field of operation.

This is particularly significant because the National Labor Relations Act is nothing but the Trade Commission Act applied to another sort of unfair practice.

"The machinery for the prevention of unfair labor practices affecting commerce follows closely the familiar provisions of the Federal Trade Commission Act, a procedural pattern which has been repeatedly approved as an appropriate and constitutional method for the administration of Federal law." NLRB, First Annual Report, p. 11 (1936).

See also Senate Rep. 573, 74th Cong., 1st Sess. (1935) 14; H. R. Rep. No. 972, 74th Cong., 1st Sess. (1935) 21; and H. R. Rep. No. 1147, same session, 23.

In the same way federal regulation of future trading in grain was held in *Dickson v. Uhlmann Grain Co.*, 288 U. S. 188 (1933), not to imply a prohibition of more vigorous state regulation.

The case of *Mintz v. Baldwin, Com'r. of Agriculture and Markets of New York*, 289 U. S. 346, 77 L. ed. 1245, 53 S. Ct. 611 (1933) involved an alleged conflict between the Cattle Contagious Disease Acts of Congress (Feb. 2, 1903, 32 Stat. 781, 21 U.S.C. secs. 111, 120-122; March 3, 1905, 33 Stat. 1264, 18 U.S.C., sec. 118, 21 U.S.C., secs. 123-127; both acts amended by the Act of Feb. 7, 1928, 45 Stat. 59), and an order of the Commissioner of Agriculture and Markets of New York, defendant, made pursuant to Secs. 72 and 74 of the New York Agriculture and Markets Law. The Federal Act of 1903, which alone raised any doubt as to the validity of the defendant's action, was described by the court as follows: (pp. 350-351)

"* * * It is a measure intended to enable the Secretary to prevent the spread of disease among cattle and other livestock. He is authorized and directed from time to time to establish such rules and regulations concerning interstate transportation from

any place 'where he may have reason to believe such diseases may exist * * * and all rules and regulations shall have the force of law'. 'Whenever any inspector * * * shall issue a certificate showing that such officer had inspected any cattle * * * which were about to be shipped * * * from such locality and had found them free from * * * communicable disease, such animals, so inspected and certified, may be shipped * * * *'without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture * * *'* Secs. 1; 21 U.S.C. sec. 120, 121." (Italics ours)

The facts giving rise to the legal issue were these (pp. 347-349):

"Defendant, acting under state statutes, made and is enforcing an order to guard against Bang's disease, bovine infectious abortion. The order requires that the cattle imported into New York for such purposes and also the herds from which they come shall be certified to be free from that disease by the chief sanitary official of the state of origin and that each shipment be accompanied by such a certificate.

"Plaintiffs shipped 20 head from Wisconsin for delivery to one Bartlett in New York. The animals were accompanied by a certificate which was sufficient as to them, but there was nothing to show the freedom from Bang's disease of the herd or herds from which they came. For that reason defendant refused to permit them to be delivered, and so plaintiffs were compelled to take them out of New York.

"Plaintiffs brought this suit for a temporary and perpetual injunction to restrain enforcement of the order. Their claim, so far as here material, is that the order is repugnant to the commerce clause because

in conflict with federal statutes relating to interstate transportation of livestock. . . . *The Federal Department of Agriculture, November 15, 1932, by letter to defendant declared that the Department had issued no quarantine or regulations pertaining to Bang's disease and that its policy for the present is to leave the control with the various states.*" (Italics ours)

In dealing with the legal issue, the Court first discussed the validity of defendant's order in the absence of federal legislation (pp. 349-350):

"The order is an inspection measure. Undoubtedly it was promulgated in good faith and is appropriate for the prevention of further spread of the disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate transportation as to contravene the commerce clause. *Gibbons v. Ogden*, 9 Wheat. 1, 203, 204; *Minnesota Rate Cases*, 230 U. S. 352, 402, 406; *Reid v. Colorado*, 466; *Henderson v. Mayer*, 92 U. S. 259, 268. Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order."

Speaking next of the approach to be taken in determining the effect of federal legislation on a subject covered by a state law, Mr. Justice Butler said (p. 351):

"The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear. *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 293 U. S. 380, 391; *Carey v. South Dakota*, 250 U. S. 118, 122; *Savage v.*

Jones, 225 U. S. 501, 533; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 623."

The vital part of the opinion, so far as the exact point in issue there as here is concerned, is found in the following language: (p. 351-352)

"* * * Plaintiffs' cattle were not inspected by, and no certificate was issued under, federal authority. Unless the Act itself operates to prevent the enforcement of the order the suit was rightly dismissed. The express exclusion of state inspection extends only to cases where federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases * * * *Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures to suppress Bang's disease. This case is governed by the principle on which rests the decision in Asbell v. Kansas, 209 U. S. 251. Defendant's order does not conflict with the Act of 1903.*" (Italics ours)

The order dismissing the ~~bill~~ was affirmed.

The analogy of this case to the problem dealt with by the Court in the *Rueping* case is obvious. That problem is a preempted field problem,—appellants' POINT I.

b. The sort of remedy provided indicates the continuance of State power.

The National Labor Relations Board has "power to issue" a complaint only when an employee or labor union requests it,—that is, charges the existence of an unfair labor practice affecting commerce. The refusal of the Board

to act is final. The Act confers no private rights or private remedies. The Act is a public Act and the rights enforced are those of the public. *Amalgamated Utilities Workers v. Consolidated Edison Co.*, 309 U. S. 261, 84 L. ed. 738; *Nat'l. Licorice Co. v. Nat'l. L. R. Bd.*, 309 U. S. 350, 84 L. ed. 799, 60 S. Ct. 569 (1940).

Where a statute gives only to the government redress for a wrong, it is unusual to apply the doctrine of "occupation of the field." Where the federal remedy is narrow, the implication of state exclusion is absent. Where the constitution, as in *In re Debs*, 158 U. S. 564 (1895), or the statutes, as in the Sherman Act (1890) prior to the Clayton Act (1914), empower the *United States* to obtain equitable or criminal redress, but grant no rights (or only damages) to others, there is little ground for an implied exclusion of state legislation for the protection of the interests of the *State* or of *individuals* aggrieved by the very acts which the Federal law, in its limited way, seeks to suppress.

The very narrowness of the Federal remedy provided by the National Labor Relations Act is a reason for holding that, by the enactment of it, Congress did not intend to preempt the field. In the first place, when complaint is made to the Board, the Board has a discretion as to whether it will proceed. Its discretion will be exercised in a manner dependent upon whether it finds upon investigation that interstate commerce is substantially affected. There can be no rigid mathematical formula for determining such a question. The Board is given the widest kind of discretion. Certainly, until the Board determines that interstate commerce is substantially affected or indicates in some manner that it will assume jurisdiction, State acts aimed

at preserving industrial peace through similar agencies must have full scope for operation. The language of the Wisconsin Court in the *Rueping* case quoted is most pertinent.

“* * * The fact that under the National Labor Relations Act the board initiates all proceedings to administer or to enforce the act should also be considered in this connection. It cannot have been supposed that the cases deemed by the board so important to affect interstate commerce as to warrant intervention or with which the board had time to deal would include all of the cases which the states might need to deal with in the interests of local peace and good order. It cannot have been intended to ‘paralyze the efforts of a state to protect her people against impending calamity’ and commit the matter to the exclusive discretion of a distant and overworked federal agency. * * *”

If the National Labor Relations Act really “occupies the field” of labor relations then it would seem that the decision of this Court in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229, 57 S. Ct. 857 and *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 82 L. ed. 872, 58 S. Ct. 578, were wrong.

These cases were decided by this Court after it had sustained the National Labor Relations Act in *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. ed. 893 (1937) and the other cases that came down at the time these historic decisions were rendered. For “occupying the field” means not the exclusion of like remedies administered by like administrative agencies, it means exclusion of all State regulation of the field of interest. It would be difficult to hold that the creation of the National Labor Relations Act vetoes State legislation

of the same kind without at the same time holding much of the substantive State laws with respect to the rights of labor vetoed by congressional enactment of the National Labor Relations Act. In the *Shinners* and *Senn* cases, above cited, this Court looked to the Wisconsin law for the substantive rights of labor.

7. The National Labor Relations Act does not exclude the States from the field of labor relations "affecting commerce" until the National Labor Relations Board has entered an order concerning practices of a particular employer.

If the National Labor Relations Act is to be applied to a particular employer, the National Labor Relations Board must make a finding that his labor practices, alleged to be unfair "substantially affect interstate commerce". The National Labor Relations Board is the exclusive judge (within constitutional bounds) as to whether interstate commerce is sufficiently affected to warrant any action by it—just as the Interstate Commerce Commission is the exclusive judge (within constitutional bounds) of how far interstate railroad rates should be controlled by it because of their affect upon interstate commerce. As this Court pointed out in *Santa Cruz Packing Co. v. Nat'l. L. R. Bd.*, 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656 (1938), the constitutional question of whether the practice affects commerce so as to permit the National Board to exercise jurisdiction, is a question of degree, just like the question "met whenever the Interstate Commerce Commission is required to find whether an intrastate rate or practice of an interstate carrier causes an undue and unreasonable discrimina-

tion against interstate or foreign commerce" (citing the *Shreveport Case*, 234 U. S. 342, 351). It is also a question of degree whether the particular practice sufficiently affects commerce to interest the National Labor Relations Board in exercising its jurisdiction. And this is a question, like others under this and similar acts, calling for the expert judgment of the special agency appointed to carry out the act, a question on which the courts will not pass. *Great Northern R. R. Co. v. Merchants Elevator Co.*, 259 U. S. 285 (1922); *Board v. Great Northern Ry Co.*, 281 U. S. 412 (1929); *State ex rel. Superior v. Duluth St. Ry. Co.*, 153 Wis. 650 (1913); *Agwilines Inc. v. N. L. R. B.*, 87 Fed. (2d) 146, 150 (1936).

Any order entered by a State Board remains as fully operative as the State's authority over the "intrastate rate or practice of an interstate carrier" at least until the National Labor Relations Board has found that a particular employer's intrastate labor practice so affects interstate commerce that the National Labor Relations Board should act. *Board of R. R. Commerce v. Great Northern Ry.*, 281 U. S. 412, 74 L. ed. 936, 50 S. Ct. 391 (1930); *Interstate Commerce Commission Control of Intrastate Rates* (1934) 44 Yale L. J. 133.

Board v. Great Northern Ry., supra, is important in relation to this problem. It deals with intrastate railroad rates, like the earlier Minnesota Rate case and the Shreveport case. In the *Board v. Great Northern Ry.* case, supra, the railway sought to enjoin the Board of Railroad Commissioners of North Dakota from enforcing its order prescribing certain intrastate class rates, on the ground that there was then pending before the Interstate Commerce Commission "the question whether the intrastate rates, as

thus prescribed, cause an undue or unreasonable discrimination against interstate commerce in violation of Section 13 of the Interstate Commerce Act." The U. S. District Court granted an interlocutory injunction. On appeal by the state commission, this Court reversed the order of the District Court and directed the dismissal of the bill of complaint. In its opinion the Court, speaking of the considerations invoked in the *Minnesota Rate* case said (at pp. 421-422):

"* * * Dealing with the interblending of operations in the conduct of interstate and local business by interstate carriers, the Court said that these considerations were for the practical judgment of Congress, and that if adequate regulation of interstate rates could not be maintained without imposing requirements as to such intrastate rates as substantially affected the former, it was for Congress, within the limits of its constitutional authority, over interstate commerce, to determine the measure of the regulation it should apply. *It was not the function of the Court to provide a more comprehensive scheme of regulation than Congress had decided upon, nor, in the absence of Federal action, to deny effect to the laws of the State enacted within the field which it was entitled to occupy until its authority was limited through the exertion by Congress of its paramount constitutional power.* On the assumption that Section 3 of the Interstate Commerce Act should be construed as applicable to unreasonable discriminations between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rate exclusively, the Court was of the opinion that the controlling principle governing the enforcement of the act should be applied to such cases and that the question of the existence

of such a discrimination would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts.

Further, at page 424, the Court said, still referring to the *Minnesota Rate* case:

"The grounds for invoking this principle of preliminary resort to the Interstate Commerce Commission are even stronger when the effort is made to invalidate intrastate rates upon the ground of unjust discrimination against interstate commerce. Not only are the questions as to the effect of intrastate rates upon interstate rates quite as intricate as those relating to discrimination in interstate rates, not only is there at least an equal need for the comprehensive, expert and continuous study of the Interstate Commerce Commission, and for the uniformity obtainable only through its action, but in addition there is involved a prospective interference with State action within its normal field, in relation to the domestic concern of transportation exclusively intrastate. The Court found no warrant for the contention that Congress in enacting the Interstate Commerce Act intended that there should be such an interference before the fact of unjust discrimination had been established by competent inquiry on the part of the administrative authority to which Congress had entrusted the solution of that class of questions." (Italics ours)

The court held, p. 430, that "the power of the State to establish rates for its internal commerce" was not suspended by the mere existence of the Federal Act but was subject to suspension only upon a finding by the Interstate Commerce Commission, after a full hearing, that an unjust discrimination was created.

The fact situations and the practical implications of this case in relation to the power of State Boards to act with respect to labor relations until the National Board has acted, are so analogous as to make the quotations especially pertinent. This case alone would be ample authority to support an order of the State Board made at any time before the National Board has issued an order concerning the same practice. Certainly there can be no reasonable doubt that where the jurisdiction of the National Board has not even been invoked, a State Board may act.

Closely following on this intrastate railroad rate case are two cases sustaining the power of State commissions to fix the method of accounting for depreciation of telephone properties within a state, though since 1906 the Federal Regulatory Agency, first the Interstate Commerce, later the Federal Communications Commission, was authorized to require uniform accounting by telephone companies: *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. ed. 255, 51 S. Ct. 65 (1930); *Northwestern Bell Tel. Co. v. Nebraska State Ry. Com.*, 297 U. S. 471, 80 L. ed. 810, 56 S. Ct. 536 (1936). Here the Court decided that State power is not ousted by the Federal government's potential entry into the field of depreciation accounting.

After the National Commission has acted, the state authority is ousted because the National Act makes it unlawful "to keep any other accounts, records, or memoranda, than those prescribed or approved by the commission." ICA secs. 20 (5), 49 U. S. C. sec. 20 (5). Communications Act 1934, 40 Stat. 1078, sec. 220 (g), 47 U. S. C. A. sec. 220 (g). The national rule thus being exclusive, a state system differing from it would necessarily be in ac-

tual conflict with the national rules. (But there is no reason to think that the State could not require the companies to observe the nationally prescribed rules, subject to state penalty.) Where no actual conflict exists, because the National Commission has not yet required anything, the state requirement remains in full force. In the *Northwestern Bell Telephone* case the court said (p. 478):

"Both the language of the statute already quoted, and the nature of its subject-matter indicate that it contemplated no restriction of state control over depreciation rates until the Interstate Commerce Commission had prescribed its own rates. State Commissions were not deprived of power to fix rates for intrastate telephone service, in determining which rates of depreciation chargeable to operating expenses play an important part. See *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658, 78 L. ed. 1182. The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to Section 20 (§) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates.

"* * * Section 20 (5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates of telephone companies except by prescribing a rate administratively determined by the commission itself. A direction that the commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for

themselves in defiance of state power. The doubtful constitutionality of the statute, if so construed, precludes our acceptance of such a construction."

Of like tenor and effect is *McDonald v. Thompson et al.*, 305 U. S. 263, 83 L. ed. 164, 59 S. Ct. 176 (1938), in which case it was held that a common carrier by motor vehicle who had been using Texas highways in interstate transportation since before the passage of the Federal Motor Carrier Act was not entitled to continue operations under the proviso of the Act relating to carriers "in bona fide operation" over routes for which application for a certificate of public convenience and necessity is made to the Interstate Commerce Commission, where the carrier's operations had been without authority of the Texas Railroad Commission. The case stands for the proposition that until the Federal Commission acts, the State laws are operative; that the passage of the Motor Carrier Act did not in and of itself deprive the states of authority and that conflict with State authority can arise only if the Federal agency has been appealed to and acted.

In *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 79, 83 L. ed. 500, 59 S. Ct. 438 (1939), a New Hampshire statute prohibited operation of motor vehicles for specified transportation by drivers who had been continuously on duty for more than twelve hours. It was urged that the State statute had been superseded by the Federal Motor Carrier Act prior to the Interstate Commerce Commission prescribing regulations. It was held that it could not be inferred that Congress, in enacting the statute under the commerce clause, intended to supersede any State safety measure prior to the effective date of a Federal measure or regulation of the Interstate Commerce Commission, suit-

able to replace it, and that purpose to replace the local law by the mere enactment of the Federal Motor Carrier Act would have to be definitely expressed. Her again, the mere grant of power to a Federal agency to act does not constitute action by the government supplanting State authority until the administrative body has acted. See also: *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 83 L. ed. 752, 59 S. Ct. 528 (1939), and *Eicholz v. Public Service Commission*, 306 U. S. 268, 622, 83 L. ed. 642, 59 S. Ct. 532 (1939).

In the last cited case, Eicholz had applied for a permit from the Interstate Commerce Commission and that application was still pending at the time of the hearing below. The State Public Service Commission of Missouri had revoked his permit as an interstate carrier because he was using his interstate license for intrastate business contrary to the provisions of the Missouri statutes. It was held that the action of the Missouri Commission was not in excess of State authority at least until the Interstate Commerce Commission acted. It will be noted that the Wisconsin Supreme Court in its decision in the case at bar follows the exact rationale of these cases.

All of the above cases involve state action with respect to matters of local concern which are well within the police power of the state. It would be difficult to conceive of any matter of greater local concern than the maintenance of law and order in relation to the peaceful operation of industry. When the Congress enacted the National Labor Relations Act its competency to enter the field at all was extremely doubtful. The boundaries of the jurisdiction of the National Board were completely unknown, and can be determined only by the process of inclusion and exclusion.

as individual cases arise. *Santa Cruz Packing Co. v. Nat'l. L. R. Bd.*, 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656, 1938).

As was stated by the Wisconsin Court in the *Rueping* case: (p. 491)

"It seems to us a violent assumption that in dealing with a subject in which the limitations on its power were and are so uncertain as to require determination by such a process congress could have intended to exclude state legislation in the field, except so far as it conflicted with the federal act. * * *"

Exclusion of state legislation in the field would have resulted in a no man's land for years to come, while the extent of the jurisdiction of the National Board was being evolved by the gradual process of inclusion and exclusion in individual cases as they might arise. As stated by the Wisconsin Court in the *Rueping* case (p. 491)

"* * * If it [the Congress] did so intend, then the prediction may safely be made that as a practical matter jurisdictional doubts will for years preclude effective administration either by the state or national governments. * * *"

No one can deny the force of those observations.

8. The pattern of all recent federal legislation and executive action reveals a general purpose to cooperate with, rather than to supplant, the states in socio-economic legislation.

Under modern socio-economic conditions the need for national action in certain fields is now generally admitted. Hence Congress is extending its powers into fields hitherto

left to exclusive regulation by the states. However, as we have shown, it does not follow that the entry of Congress necessarily excludes the states, nor has Congress shown such an intent. A study of the recent trend in federal legislation proves that we are living in an era of federal-state cooperation rather than mutual exclusiveness. See Koenig, *Federal and State Cooperation under the Constitution*, 36 Mich. L. Rev. 752 (1938).

This cooperation has taken various forms, including: First, federal grants in aid, Koenig, *supra*, pp. 756-759, as by the Social Security Act, 49 Stat. 620 (1935), 42 U. S. C. (Supp. II, 1936), c. 7; and the Wagner-Peyser Act, 48 Stat. L. 113 (1933), 29 U. S. C. (1934) secs. 49-491, establishing a nation-wide United States Employment Service. Second, supplementary legislation, Koenig, *supra*, pp. 759-761, such as the Hawes-Cooper Act of 1929, 45 Stat. 1084, 49 U. S. C. (1934) sec. 60, allowing the states to prohibit the sale in the original package of convict-made goods shipped in interstate commerce, upheld in *Whitfield v. Ohio*, 297 U. S. 431 (1936); the Ashhurst-Sumners Act, 49 Stat. 494 (1935), 49 U. S. C. (Supp. II, 1936), sec. 61, prohibiting the transportation of convict-made goods intended for delivery and sale in another state where the local laws forbid such sale, upheld in *Kentucky Whip and Collar Co. v. Illinois Central R. R.*, 299 U. S. 334 (1937). Other instances of supplementary legislation include the repression of lotteries, 28 Stat. 963, (1895) 18 U. S. C. (1934) sec. 387; the liquor traffic, 26 Stat. 313 (1890), 37 Stat. 699, 27 U. S. C. (1934) secs. 121-122; traffic in game taken in violation of state laws, 31 Stat. 188 (1900), 35 Stat. 1137 (1909), 18 U. S. C. (1934), sec. 392; various criminal activities, such as the white slave traffic, 36 Stat. 825 (1910), 18 U. S. C. (1934), sec. 399, up-

held in *Hoke v. U. S.*, 227 U. S. 308 (1913); traffic in stolen motor vehicles, 41 Stat. 324 (1919), 48 U. S. C. (1934), sec. 408, upheld in *Brooks v. U. S.*, 267 U. S. 432 (1925); kidnapping, 47 Stat. 326 (1932), 48 Stat. 781 (1934), 18 U. S. C. (1934) sec. 408a; racketeering, 48 Stat. 979 (1934), 18 U. S. C. (1934), sec. 420a. The Act of June 24, 1936, 49 Stat. 1899, U. S. C. A., sec. 407a, prohibiting interstate transportation of strike-breakers, is of this type. In addition there is the Fair Labor Standard Act of 1938, 52 Stat. 1060, 29 U. S. C. A. Sec. 201, et seq., 29 U. S. C. Sec. 201, barring from interstate commerce certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to the standards set up by the Act, upheld by this Court in *United States v. Darby*, 312 U. S. 100, 85 L. ed. 611, 61 S. Ct. 451, (1941) and in *Opp Cotton Mills, Inc., et al. v. Adm'sr. of the Wage & Hour Div., etc.*, 312 U. S. 126, 85 L. ed. 627, 61 S. Ct. 524 (1941). Third, legislation or joint resolutions consenting to or authorizing interstate compacts, Koenig, *supra*, pp. 761-768, especially 761, n. 45, 17. Of the 56 of such acts or joint resolutions passed since 1789, seventeen were adopted in the period 1935-1938. Fourth, encouraging reciprocal legislation, *ibid*, pp. 768-769. Fifth, the establishment of regional planning agencies such as the Tennessee Valley Authority, *ibid*, pp. 769-771. Sixth, joint conferences, *ibid*, pp. 771-772. And Seventh, the utilization of state administrative agencies, *ibid*, pp. 772-784.

This last cooperative technique has been applied to the apprehension of fugitives from justice, 18 U. S. C. (1934), sec. 662; the enforcement of the National Prohibition Act; public health administration; the enforcement of the Plant Quarantine Act, 37 Stat. 316 (1912), 7 U. S. C. (1934), sec.

156; the Public Utilities Act of 1935, 49 Stat. 803 (1935), 15 U. S. C. (Supp. II, 1936), sec. 79 et seq; the Pure Food and Drug Act of 1906; the Lacey Act, 31 Stat. 187 (1900), 16 U. S. C. (1934), sec. 701; the Migratory Bird Treaty Act, 40 Stat. 755 (1918), 16 U. S. C. (1934), secs. 703-711, deputizing state wardens to supervise migratory game; the Transportation Act of 1920, 41 Stat. 484 (1920), 49 U. S. C. (1934), sec. 13 (3), "ordering the Interstate Commerce Commission to notify interested states of all proceedings bringing into issue any rate, regulation, or practice made or imposed by state authorities;" permitting the Commission "to confer with state authorities concerning the 'relationship between rate structures and practices' of carriers subject to state and federal regulation, and, under rules to be prescribed by it, to hold joint hearings 'on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission,'" finally, to "avail itself of the cooperation, services, records and facilities of such State authorities in the enforcement of any provision of this act." Koenig, *supra*, at pp. 776-777; the Motor Carrier Act, 49 Stat. 543 (1935), 49 U. S. C. (Supp. II, 1936), secs. 301-327, authorizing the Interstate Commerce Commission to utilize "joint boards," 49 Stat. 549, sec. 205 (b), (c) (1935), 49 U. S. C. (Supp. II, 1936), sec. 305 (b), (c); the Selective Service Act, 40 Stat. L. 76 at 79 (1917), authorizing the President to create local supervisory draft boards; the Civilian Conservation Corps administration, Koenig, *supra*, at page 781; the N. I. R. A., 48 Stat. 195, tit. I, sec. 2 (a) (1933), granting the President authority to utilize state officers and employees, with Wisconsin (L. 1933, c. 476, Wis. Stats. (1935) secs. 110.01 to 110.10) and twelve other states responding

with statutes permitting cooperation with the federal government in this manner, Koenig, *supra*, page 781, n. 118.

The above review illustrates convincingly the efforts being made by the executive and legislative departments of federal and state governments to blend their powers for the common welfare of state and nation. This Court has shown no disposition to adopt an attitude out of harmony with the other departments of government.

9. All of the recent decisions of this Court show a disposition to interpret the national constitution and statutes to protect the State's legislative powers against nullification by implication from congressional action or inaction—in view of the expansion of exercise of federal power, this has been a necessary trend if the federal system under the constitution is to be maintained.

As a result of the recent broadening of the scope of congressional regulation of intrastate activities formerly controlled exclusively by the states, there is an ever increasing fear of impairment of State sovereignty. This Court has repeatedly warned of such a result in recent cases. In the case of *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), holding the Guffey-Snyder Coal Act, 49 Stat. 991, invalid, the court stated (at pp. 295-296):

"The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on

the one hand nor abdicated on the other. . . . Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the court warned of the danger of pushing the authority of the federal government to such an extreme as "to obliterate the distinction between what is national and what is local and create a completely centralized government." See the opinion of the court, at pp. 30, 37.

In *Kelly v. Washington*, 58 S. Ct. 87 (1937) the Court reversed a decision of the Washington Supreme Court holding a state statute relating to the inspection and regulation of vessels inoperative because impinging on a field occupied by the United States. This case is of particular importance for several reasons. First, it contains a most comprehensive and authoritative discussion of the subject of implied exclusion of state legislation by congressional silence or action. Second, it was decided only after reargument, in which the solicitor general participated for the United States, as *amicus curiae*, by special leave of court, the latter, after the original hearing, having requested the attorney general to present the views of the

government upon the question "whether the state act or the action of the officers of the state thereunder conflicts with the authority of the United States or with the action of its officers under the acts of Congress"; 58 S. Ct. 87, 89; third, the state supreme court had held its own statute invalid "if applied to the navigable waters over which the federal government has control." 186 Wash. 589, 596, 59 P. (2d) 373, 376.

This Court took a more favorable view of the state legislation than the State Supreme Court itself, and reversed the latter's decision. The court said (at pp. 91-2):

"The next question is whether the federal statutes are to be construed as implying a prohibition of inspection by state authorities of hull and machinery to insure safety and determine seaworthiness in the case of vessels, which in this respect lie outside the federal requirements.

"The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government. 186 Wash. 589, 593, 596, 59 P. (2d) 373. And this is the argument pressed by respondents and the Solicitor General.

"This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no fed-

eral legislation. The argument is appropriately addressed to those cases where States may act in the absence of federal action but where there has been federal action governing the same subject."

"... The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

"When the state is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the state to exclude diseased persons, animals, and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the state is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess."

The state law was upheld, except for certain structural requirements for equipment moving from state to state, which the court held to offend against the rule (inherent in the commerce clause, regardless of national legislation) prohibiting any state regulation interfering with the uniformity indispensable to the carrying on of interstate commerce.

Structural requirements that were an impediment to road-traveling commerce, as customarily conducted, did not lead to the invalidation of the laws of South Carolina attacked in *South Carolina Highway Dept. v. Barnwell Bros.*, 57 S. Ct. 510 (1938). Though Congress had enacted

the Federal Motor Carrier Act, 49 Stat. 546 (1935), 49 U. S. C. A. sec. 304, its coverage was so different from the weight and size limitations imposed on vehicles by the state law that it was not even contended that Congress had occupied the field to the exclusion of the latter. The contention was simply that the commerce clause itself invalidated the state law. The court said (at p. 514):

"But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might adopt, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intra-state. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways." *South Carolina Highway Dept. v. Barnwell Bros.*, 58 S. Ct. 510, 514 (1938)

See also: *Chicago Tile & Trust Co. v. Forty-one Thirty-Corp.*, 302 U. S. 120, 82 L. ed. 147, 58 S. Ct. 125, 128 (1937), upholding an Illinois statute claimed to be excluded by the Federal Bankruptcy Act; *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 215 (1937), involving the consent of the West Virginia legislature to the acquisition of certain lands by the United States; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546 (1938), sustaining a state tax on gross receipts derived from the sale of advertising space in interstate publications; *Helvering v. Therrell*, 303 U. S. 218, 82 L. ed. 758, 58 S. Ct. 539, 542 (1938), upholding a federal tax; *Duckworth v. State of Arkansas*, — U. S. —, — L. ed. —, 62 S. Ct. 311 (decided Dec. 15, 1941), upholding a pro-

vision of the Arkansas statutes which made it unlawful for any person to ship into the state any distilled spirits without first having obtained a permit from the State Commissioner of Revenue; *Federal Trade Comm. v. Bunte Bros.*, 312 U. S. 349, 85 L. ed. 881, 61 S. Ct. 580 (Feb. 17, 1941), setting aside an order of the Federal Trade Commission commanding an Illinois candy manufacturer engaged in distributing his products in Illinois in "break and take packages" which makes the amount the purchaser receives dependent upon chance, to cease and desist from such practices; *People of State of Calif. v. Thompson*, 313 U. S. 109, 85 L. ed. 1219, 61 S. Ct. 930 (Apr. 28, 1941), upholding a California statute requiring every transportation agent to procure a license from the State Railroad Commission, to pay a license fee and file a bond; *McDonald v. Thompson et al.*, 305 U. S. 263, 83 L. ed. 164, 59 S. Ct. 176 (1938), upholding state action with respect to a common carrier by motor vehicle engaged in interstate transportation until the Federal agency has acted; *Townsend v. Yeomans*, 301 U. S. 441, 81 L. ed. 1210, 57 S. Ct. 842 (May 24, 1937), upholding Georgia legislation prescribing maximum charges for services of tobacco warehousemen; *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 79, 83 L. ed. 500, 59 S. Ct. 438 (1939), upholding a New Hampshire statute prohibiting operation of motor vehicles for specified transportation by drivers who had been continuously on duty for more than twelve hours up to a point where the Federal agency has acted; *Eichholz v. Public Service Comm.*, 308 U. S. 268, 622, 83 L. ed. 642, 59 S. Ct. 532 (1939), holding that the authority of the Public Service Commission of the State of Missouri to revoke a motor carrier's interstate permit in enforcing traffic regulations

was not superseded by the Federal Motor Carrier Act where, at time of revocation of the permit, the Interstate Commerce Commission had not acted upon the carrier's application for a permit under the Federal Act; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 83 L. ed. 752, 59 S. Ct. 528 (1939), holding a Pennsylvania statute creating a milk control board with authority to regulate the milk industry; fix minimum prices to be paid by dealers; requiring dealers to obtain licenses and keep certain records, as applied to a group which operated a receiving plant wherein milk was cooled before shipment to another state for sale, was not invalid as a "burden on interstate commerce"; and *Mauer et al. v. Hamilton etc.*, 309 U. S. 598, 84 L. ed. 970, 60 S. Ct. 726 (1940), holding a Pennsylvania statute prohibiting the operation upon Pennsylvania highways of any motor vehicle carrying any other vehicle over the head of the operator of the carrier vehicle to be valid state legislation and not in conflict with the Motor Vehicle Carrier Act of 1935.

The danger of anticipating the intent of Congress, and thereby engaging in judicial legislation, is illustrated by the first *Wheeling Bridge* case (*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 13 How. 518, 592 (1852)) involving conflicting claims arising under the Federal Coasting Licensing Act and certain Virginia statutes authorizing the maintenance of a bridge over the Ohio River. This Court held in May, 1852, that the bridge was an unlawful structure, because the Act authorizing it was in conflict with the federal law. Chief Justice Taney, dissenting, stated (at p. 592):

"[Congress] has better means . . . of obtaining information, than the narrow scope of judicial proceed-

ings can afford. It may adopt regulations by which courts of justice may be guided in an inquiry like this with some degree of certainty, instead of leaving them to the undefined discretion which must now be exercised in every case that may be brought before us, without being able to lay down any certain rule, by which this discretion may be limited. It is too near the confines of legislation; and I think the court ought not to assume it."

The Chief Justice's criticism of judicial guesswork was shown to be justified when the bridge in question was declared a lawful structure by the Act of Congress of August 31, 1852, sec. 6, c. 111, 10 Stat. 110, 112, which was held constitutional in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421 (1856).

So the Webb-Kenyon Act, 37 Stat. 699 (1913), 27 U. S. C. sec. 122, was the answer of Congress to *Louisville & Nashville R. Co. v. Cook Brewing Co.*, 223 U. S. 70 (1912) and earlier cases which construed the Wilson Act, 26 Stat. 313, to the disadvantage of state legislation; while the ultimate answer was amendment of the constitution itself so as to free the states even more completely from negative implications not only of congressional legislation but of the commerce clause itself. Amendment XVIII Sec. 2, *U. S. v. Lanza*, 260 U. S. 377 (1922). Amendment XXI Sec. 2, *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59 (1936).

Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87 (1926), was in like manner overruled by Congress within a few weeks. 44 Stat. 250 (1926), 7 U.S.C. sec. 161.

In *Hines v. Davidowitz*, 312 U. S. 52, 85 L. ed. 366, 61 S. Ct. 399, 408, it was observed by Chief Justice Stone in the dissent in said case:

"At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted. Cf. *Graves v. O'Keefe*, 306 U. S. 466, 479, 480, 487, 59 S. Ct. 595, 597, 598, 601, 83 L. Ed. 927, 120 A.L.R. 1466. The Judiciary of the United States should not assume to strike down a state law which is immediately concerned with the social order and safety of its people unless the statute plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern."

This Court, in its decisions, has repeatedly recognized the vital importance of not despoiling the states of their powers by any implied congressional intent to preempt the field. The Court divided in the case above cited because of the very close and intimate relationship of the subject dealt with by the State legislation (registration and regulation of aliens) with that of the exclusive power of Congress in international affairs. The State legislation was pregnant with possible repercussions in the field of international diplomacy—repercussions Congress had deemed it wise to avoid dealing with matters reserved exclusively to it and with respect to which the states have no power even in the absence of federal action.

The dissimilarity between the subject matter of the Pennsylvania legislation with respect to aliens and state regulation with respect to employment relations and the significance of congressional preemption in the one field, as compared with congressional preemption in the other with respect to despoiling the states of their reserve powers under the 10th Amendment to Constitution of the United States is so perfectly apparent as to need no exposition.

The opinion of the Wisconsin Supreme Court, written by Justice Wickhem in *Wisconsin Labor Relations Board v. Fred Rueping L. Co.* (1938) 228 Wis. 473, 279 N. W. 673, is a masterful analysis of the preempted field question as is the opinion of the Court of Appeals of the State of New York in *Davega City Radio Incorporated v. State Labor Relations Board*, 281 N. Y. 13, 22 N. E. (2) 145. Both decisions hold that the Congress did not intend to preempt the field of labor relations by the enactment of the National Labor Relations Act. The appellants cite no decisions to the contrary. The decisions are so essentially sound in analysis that the appellants did not even challenge their soundness in the Court below. Their soundness was conceded. See Page 45 this brief.

B. The only criteria which appellants advance in support of their preempted field argument is that of the Congress having "occupied the field" and dealt with the "same subject"—the weakest kind of criteria and recognized as meaningless.

Opposed to the force and logic of all criteria of congressional intent above set forth, the appellants urge a congressional intent to preempt the field of labor relations by resort to the formula of "occupied the field" and "same subject". Both criteria are obviously the weakest kind of criteria and are becoming recognized as meaningless. "Occupied the field" begs the whole question. Every time Congress enacts legislation it occupies some field. The question is whether the Congress intended to occupy the field exclusively. Any recognition of "occupied the field" or "same subject" as infallible tests of congressional intent or as even persuasive tests would have resulted in different results in all of the numerous cases heretofore cited where Congress has "occupied the field" and legislated with respect to the "same subject". Thus in the dissenting opinion written by Chief Justice Stone in *Hines v. Davidowitz*, 312 U. S. 52, 61 Supreme Court 399, 410 it is stated:

"Little aid can be derived from the vague and illusory but often repeated formula, that Congress 'by occupying the field' has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history."

Further, no cases are cited in support of appellant's position except (1) *Hines v. Davidowitz, supra*—clearly distinguishable, (2) National Labor Relations Board cases which do not remotely support the position taken, and (3) Railroad cases. The inapplicability of railroad cases such as are relied upon was commented upon by the Wisconsin Court in the *Rueping* decision and by this Court in *Federal Trade Commission v. Bunte Brothers*, 312 U. S. 349, 61 Supreme Court 580, 85 L. ed. 881 (1941):

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system. . . . There is the widest difference in practical operation between the control over local traffic intimately connected with interstate traffic and the regulatory authority here asserted. Unlike the relatively precise situation presented by rate discrimination, "unfair competition" was designed by Congress as a flexible concept with evolving content. *Federal Trade Comm. v. R. F. Keppel & Bro., supra*, at pages 311, 312 of 291 U. S., at pages 425, 426 of 54 S. Ct., 78 L. Ed. 814. It touches the greatest variety of unrelated activities. The Trade Commission in its Report for 1939 lists as "unfair competition" thirty-one diverse types of business practices which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition. The construction of Paragraph 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law.

Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination. An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress."

These observations apply with equal force to the functioning of the federal system in the field of labor relations.

C. Additional comments in relation to appellant's argument.

On page 23 of their brief, the appellants refer to the notorious Mohawk Valley formula. The reference with respect to congressional intent to preempt the field and exclude the states from all State action is not readily perceivable.

On page 24 reference is made to the effect of a decision of a State Board which discourages collective bargaining. No such decisions are referred to. The states are quite as sincerely interested in promoting industrial peace by promoting collective bargaining as was the Congress in enacting the National Labor Relations Act. There can hardly be any presumption that the administrative boards or the courts of the state will not do their full duty in relation to any such laudable state objective. The presumption must be exactly to the contrary. The argument is without validity. Further, such argument and other arguments which appellants make are arguments which might have been addressed to Congress as reasons why it should preempt the field. The arguments have no bearing upon congressional intent to preempt the field.

It is asserted that the State Board has branded the appellants as outlaws under a State Labor Relations Act and subjected them to the forfeiture of their collective bargaining rights. Appellant's brief, p. 24. If the appellants have been branded as outlaws, then many employers of labor have been branded as outlaws by the National Labor Relations Board and in many instances upon evidence that would not get the prosecution to the jury in a criminal case. Have we reached a stage in our thinking where it is entirely proper and fitting to brand one class of our citizens as "outlaws" and where it is reprehensible—even unconstitutional—to brand another class as outlaws? The answer is—neither Act brands any class as "outlaws". Congressional and State outlawing of conduct does not stigmatize those who engage in the conduct denounced as "outlaws". The administrative remedy, of all remedies that we know of, connotes the least by way of stigmatization of the individual.

It was urged in the Supreme Court of the State that the appellants had been subjected to the forfeiture of their collective bargaining rights. The Supreme Court specifically rejected the appellant's position in this regard (R. 50:52).

It is asserted that the enforcement of a Labor Relations Law must leave the detection and appraisal of imponderables to the essential function of an exclusive expert administrative agency, namely the National Labor Relations Board and to the exclusion of all state expert administrative agencies and that the present emergency has made more imperative than ever before the necessity of a uniform national policy of labor relations. It is not perceived wherein the present emergency has any bearing upon Congressional intent at the time of the enact-

ment of the National Labor Relations Act. Further, it would seem that Congress might well be of the present opinion that the national emergency requires the utmost of state and federal cooperation rather than state exclusion from cooperating.

POINT IV

APPELLANTS HAVE NO STANDING TO RAISE ANY QUESTION OF REPUGNANCE OR CONFLICT, BUT EVEN IF THEY HAVE, THERE IS NO REPUGNANCE OR CONFLICT IN THE PROVISIONS OF THE WISCONSIN EMPLOYMENT PEACE ACT WITH THE NATIONAL LABOR RELATIONS ACT "SO DIRECT AND POSITIVE" THAT THE TWO ACTS CANNOT BE RECONCILED OR CONSISTENTLY STAND TOGETHER—THE ACT DOES NOT STAND AS AN OBSTACLE TO FULL EFFECTUATION OF THE POLICY OF THE NATIONAL ACT.

- A. The underlying fallacy of appellants' argument upon this branch of the case (as upon all others) is that of (1) ignoring entirely the constitutional limitations upon congressional power to act and (2) the limited extent to which the Congress did act in enacting the National Act.

Appellants' argument upon this branch of the case takes a wide range. All points raised are academic, so far as the case at bar is concerned. There is an underlying fallacy in the major premise upon which all of appellants' argument is grounded and upon all points which they seek to raise. In their analysis of the scope and purpose of the

National Act, appellants emphasize the congressional intent to promote collective bargaining. Throughout the argument, appellants fail to note the extent to which Congress entered the field and the limited scope of the National Act in relation to the congressional policy. As appears from the House Committee Report, No. 1147, 74th Congress, 1st session, cited by appellants at page 40 of their brief, the National Act

“* * * seeks to redress an inequality of bargaining power by forbidding employers to interfere with the development of employee organization, thereby removing one of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees.”

The National Act is concerned with and deals only with employer unfair labor practices. The National Board has jurisdiction only with respect to employer unfair labor practices.

The scope and purpose have been well expressed by this court in *Myers v. Bethlehem Shipbldg. Corp.*, 303 U. S. 41, 82 L. ed. 638 (1938):

“The declared purpose of the National Labor Relations Act is to diminish the causes of labor disputes burdening and obstructing interstate and foreign commerce; and its provisions are applicable only to such commerce. In order to protect it the Act seeks to promote collective bargaining; confers upon employees engaged in such commerce the right to form, and join in, labor organizations; defines acts of an employer which shall be deemed unfair labor practice; and confers upon the Board certain limited powers with a

view to preventing such practices. If a charge is made to the Board that a person 'has engaged in or is engaging in any . . . unfair labor practice,' and it appears that a proceeding in respect thereto should be instituted, a complaint stating the charge is to be filed, and a hearing is to be held thereon upon notice to the person complained of."

Congressional power in the field in question is necessarily limited in scope. As was said by this court in *Santa Cruz Fruit Pack. Co. v. National L. Rel. Bd.*, (1938) 303 U. S. 453, 82 L. ed. 954, 960:

"* * * The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 546, 79 L. ed. 1570, 1588, 55 S. Ct. 837, 97 A.L.R. 947. 'Activities local in their immediacy do not become interstate and national because of distant repercussions'."

The business of the Allen-Bradley Company is not interstate commerce—nor are the labor relations of that company interstate commerce. The power of Congress to act at all in the field of labor relations with respect to this company is grounded upon that of protecting interstate commerce from those acts which tend to substantially burden and obstruct that commerce. That is the sole ground upon which the National Labor Relations Act has been sustained as constitutional legislation. *National Labor Rel. Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893; *Santa Cruz Fruit Pack. Co. v. National L. Rel.*

Bd., (1938) 303 U. S. 453, 466, 82 L. ed. 954, 58 Sup. Ct. 656. Thus in the latter case the court said:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states. * * *

"To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

In the declaration of policy in the National Act, the Congress clearly asserted an intention to act only where an employer's unfair labor practices had a close and substantial relation to interstate commerce. As to when an employer's unfair labor practices denounced by the Act do have this close and substantial relation to interstate commerce so as to tend to substantially burden and obstruct that commerce, the Congress deliberately left the solution

of any such question to the National Labor Relations Board which the Act established.

This court in the cases cited and in other cases has continually recognized the foregoing essential concepts as vital with respect to congressional power to enact the National Labor Relations Act. Appellants throughout their entire argument completely ignore these vital constitutional concepts. The premise upon which appellants' whole argument is grounded with respect to all points asserted by them is that of congressional power to completely regulate labor relations as a subject matter in and of itself and without regard to the foregoing vital constitutional concepts and without regard to the limited extent which Congress did act in safeguarding interstate commerce from burdens and obstructions, namely, the prevention of employer unfair labor practices which throttle collective bargaining processes; which tend to promote industrial strife and which therefore tend to substantially burden and obstruct interstate commerce.

B. The case at bar does not involve employer unfair labor practices. It deals with matters entirely outside the scope of the National Act and beyond the jurisdiction of the National Board.

As the case at bar does not involve any employer unfair labor practices, it would seem apparent that it deals with matters entirely outside of the scope of the National Act. It deals with matters over which the National Labor Relations Board has no jurisdiction at all. Appellants' objection that the National Labor Relations Board, had exclusive jurisdiction over the unfair labor practices charged

by the company, obviously must be without merit. That Board not only had no exclusive jurisdiction,—it had no jurisdiction. Neither the provisions of the Act, sec. 111.06 (2) (a) and (f), applied in the case at bar nor the order of the Board based thereon, involve any matters with respect to which the Congress legislated in the enactment of the National Labor Relations Act.

C. Appellants are without standing to raise any question of conflict or repugnance between the State and National Acts—no constitutional right of appellants has been invaded.

It would seem very apparent that the appellants have no standing to raise objections as to conflict between the various provisions of the State Act and the National Act. While the appellants assert boldly in their brief in this Court that the Act is unconstitutional, they have never previously taken that position. They have always conceded the Act to be constitutional as applied to all businesses which have no interstate commerce aspects sufficient in a proper case to give the National Board jurisdiction. We start, then, with a constitutional Act. No claim is made that the provisions of the Act applied in the instant case or that the order of the Board based thereon invades any constitutional rights of the appellants. It must follow that what the appellants actually seek to do in the case at bar is to champion the cause of others, rather than to champion any constitutional rights of their own that have been invaded. They seek to have this court decide grave constitutional questions as an academic matter. They seek an advisory opinion. They seek a declaratory judgment.

without invasion of any constitutional rights of their own.

This case arose in May 1939. Before the Board, the trial court and the Wisconsin Supreme Court, the appellants kept asserting rights under the National Act which were in conflict with rights under the State Act. The National Act confers neither private rights nor remedies. *Amalgamated Utility Workers v. Consolidated Edison Co.*, (1940) 309 U. S. 261, 84 L. ed. 738; *National Licorice Co. v. National L. Rel. Bd.*, (1940) 309 U. S. 350, 60 S. Ct. 569, 84 L. ed. 799. The National Act was in no wise involved in that no employer unfair labor practices were involved. If there was any employer unfair labor practice involved (the record does not disclose any), the appellants were perfectly free to appeal to the National Board to assume jurisdiction. If there was any ground for assumption of jurisdiction by the National Board, that jurisdiction could have been invoked and should have been invoked before the only tribunal (the National Labor Relations Board) that has jurisdiction to determine in the first instance whether it has any jurisdiction or power to proceed, *Myers v. Bethlehem Shipbldg. Corp.*, (1938) 303 U. S. 41, 82 L. ed. 638, or whether, having such jurisdiction, it desires to proceed. *Amalgamated Utility Workers v. Consolidated Edison Co.*, (1940) 309 U. S. 261, 84 L. ed. 738.

The appellants have changed their attack in the brief filed in this court. They are no longer asserting rights under the National Act. They center their attack on the proposition that the State Act stands as an obstacle to the effectuation of the policies of the National Act. This change in attack does not alter the fact that, for the appellants to be in a position to raise the questions which they seek to raise, they must show invasion of some constitutional

right of their own. Just what constitutional right of the appellants is shown to be invaded in the case at bar? We find none.

- D. The constitutional approach to the question as to whether there is such a repugnance or conflict between the provisions of the two Acts so direct and positive that they cannot be reconciled or consistently stand together* (if such question were presented, which it is not) is just the opposite approach from that which appellants take in their analysis of the question.

It is asserted that "the Federal Act seeks to protect interstate commerce from interruptions due to industrial strife by encouraging collective bargaining; the State Act discourages collective bargaining in labor relations affecting interstate commerce, and so stands as an obstacle to the operation of the Federal Act." (Appellants' brief page 30).

It will be noted that the assertion with respect to the Federal Act ignores all of the vital limitations with respect to Congressional power as well as the vital limitations of the Act itself, that is, the extent to which Congress legislated in encouraging collective bargaining,—prevention of employer unfair labor practices. Apart from this, the assertion that the State Act discourages collective bargaining is not true. The State Act redresses the inequality of bargaining power by forbidding employers to interfere with the development of employee organization and thereby seeks to remove one of the issues most provocative of in-

*Kelly v. Washington, 302 U. S. 1, 82 L. ed. 3, 58 S. Ct. 87, (1937).

dustrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees to the full extent that the National Act protects against such practices.

The appellants are able to point out but five conflicts between the National and State Acts. In marshaling their arguments the appellants elevate mere words to a point of controlling significance without any regard to whether these words are of any actual significance. Irreconcilable conflicts are predicated upon a stretching of congressional power to act beyond any area which has been recognized as within the scope of congressional power; upon a scope of the National Act with respect to congressional intent beyond any intent manifested in the Act and upon Board power to act beyond what this court has recognized as the scope of Board power to act.

The foregoing is the appellants' approach to federal power; to congressional intent, and to Board action under the National Act. The approach to the State Act is that of adopting as harsh and as irreconcilable an interpretation as ingenuity can place upon the provisions of the two Acts, and by these two approaches arrive at so-called irreconcilable conflicts between the two Acts.

The constitutional approach to any question of irreconcilable conflict must be just the opposite from any such approach. In *State ex rel. Wisconsin Dev. Authority v. Dammann* (1938) 228 Wis. 147, 190, 277 N.W. 278, the Supreme Court of the State of Wisconsin said:

"* * * This court is bound to give to an act a construction that will avoid constitutional objections

to its validity if it will bear it. *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966; *Palms v. Shawano County*, 61 Wis. 211, 21 N. W. 77; *State ex rel. Chandler v. Main*, 16 Wis. 398; *Atkins v. Fraker*, 32 Wis. 510; *Attorney General v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Bound v. Wisconsin Central R. Co.*, 45 Wis. 543. This rule applies even though the construction which leads in this direction is not the most obvious or natural construction of the act. *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270. * * *

This Court has said that the cardinal principle of statutory construction is to save and not to destroy. Thus, in *National L. R. Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893, 57 Sup. Ct. 615, this rule was announced as follows:

"The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, 307; *Papama R. Co. v. Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 472; *Blodgett v. Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346."

Even by such approach the appellants do not succeed in raising their so-called points of conflict to any constitutional proportion,—do not show "where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or consistently stand together."

E. Analysis of the so-called conflicting provisions of the two Acts.

1. The so-called conflict in the declaration of policy.

It is stated that the public policy set forth in sec. 111.01 of the Wisconsin Act omits any positive declaration in favor of promoting collective bargaining and that because of this omission the Wisconsin Act opposes the basic concept of the Federal Act because it conditions the Wisconsin Act to a conflicting interpretation and enforcement. It is further asserted that because of this, the State Act is a persistent obstacle in the way of a uniform national labor policy. Thus, because the Wisconsin Act omits any positive declaration in favor of promoting collective bargaining, an irreconcilable conflict of constitutional proportion is asserted.

The Wisconsin court recognizes that the Act seeks to foster and protect collective bargaining from employer unfair labor practices (the only practices against which the National Act protects collective bargaining) to the full extent and just as completely and effectively as does the National Act. There obviously is no conflict in the dominating purposes of the two Acts insofar as securing to labor its right to bargain collectively is concerned free from the throttling of such right by employer dominance, interference, intimidation, coercion or discrimination.

In *Century Building Co. v. Wisconsin E. R. Board*, (1940) 235 Wis. 376, 291 N. W. 305, both the Board and the courts gave as complete a remedy to employees discriminated against by employer unfair labor practices as the National Board could give in any given case and recognized the letter, spirit and purpose of the law to be

that of promoting collective bargaining free from any discrimination on the part of the employer because of union activities. In that case the Board found that three charwomen employed by the Century Building Company were discharged by the employer *solely because of their membership in a Union* and for the purpose of discouraging membership in such labor organization by discriminating in regard to their tenure of employment. The Board ordered reinstatement and back pay. The company sought to establish by noticing hearings of adverse examinations and by motion to adduce additional testimony that the charwomen were not members of the Union and that the Board's order should therefore not be sustained.

With respect to such contentions, the court said (pp. 381-382):

“* * * This is an immaterial issue. When an employer dismisses an employee for union activities or discriminates with respect to his tenure for this reason, it is of no consequence that the discharged employee is not actually a member of the union. He might be opposed to unions and steadfast in his refusal to have anything to do with them, but if his employer supposes him to be a member of the union or to be engaged in organizational activities and dismisses him on that account, he engages in an unfair labor practice under the act. Sec. 111.06 (1) (c), Stats. 1939, states that it shall be an unfair labor practice ‘to encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.’ If the employer rightly or wrongly supposes his employees to be in any stage of organizational activities leading to co-operative bargaining and dis-

criminate against those whom he supposes to be so engaged by dismissing them or otherwise discriminating against them with respect to the conditions of their employment, he engages in an unfair labor practice. Hence, we think that the issue proposed by plaintiff was not material. To construe the act so as to permit an employer to dismiss his employee for real or suspected organizational activities leading to unionization but to forbid him to discriminate against those who had completed the process and become union members would contravene the letter of the law and largely defeat its purpose. * * *"

The realities in relation to this problem are sometimes as important as words which add nothing to realities. Industrial peace is sought to be promoted by the State Act by encouraging the practice and procedure of collective bargaining free from employer dominance, coercion, discrimination, etc., to the full extent that and just as effectively as industrial peace is sought in the National Act by prohibiting employer unfair labor practices which throttle the process.

2. The so-called conflict as to the definition of a labor dispute.

The appellants point out the difference in definition in the National and State Acts. They fail to show any significance of the definition in either Act. In nearly three years' administration of the State Act we have failed to find where the definition of a labor dispute in the State Act is of any significance at all. It is of no significance with respect to sec. 111.05, which covers the subject of

representatives and elections. It is of no significance in relation to unfair labor practices covered by sec. 111.06. No case has ever turned upon this definition. We can think of no case which ever will turn upon it. Irreconcilable conflicts of constitutional proportions can hardly be predicated upon any such situation.

Appellants assert on page 34 of their brief that it is an unfair labor practice under sec. 111.06 (2) (e) for employees to strike unless a majority in the collective bargaining unit of the employees of an employer against whom said acts are directed have voted by a secret ballot to call a strike. The assertion is not true. The section quoted does not regulate when employees may strike. It does regulate intimidating and coercive conduct by the employees when acting in concert unless a majority in a collective bargaining unit of the employees of an employer against whom said acts are primarily directed have voted by secret ballot to call a strike. *Hotel and R. E. L. Alliance, Local No. 122 et al. v. Wisconsin Employment Rel. Bd., et al.* (1941) 236 Wis. 329, 295 N.W. 634.

The appellants not only misstate the import of sec. 111.06 (2) (e) but further assert that the misstated import was confirmed in the *Golden Guernsey Case*, entitled *Wisconsin E. R. Bd. v. Milk & Ice Cream D. & D. E. U. etc.*, (1941) 238 Wis. 379, 299 N.W. 31. This is not true. The decision in the *Golden Guernsey Case* is in no sense grounded upon the application of sec. 111.06 (2) (e) of the Act.

The appellants further assert that under the Federal Act, strikers regardless of their majority status are protected from employer unfair labor practices and retain their rights as employees to vote for the bargaining agency, and that under the State Act these rights are terminated.

The State Act does not terminate any such rights. The protection which the Act affords (not termination of bargaining rights) is *terminated only by action of the Board by its order in a particular case acting pursuant to authority conferred by sec. 111.07 (4) which so far as material, reads as follows:*

“ * * * Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper.
* * *

The Wisconsin Supreme Court specifically so held in its opinion in this case (R. 51-52). How are strikers protected from employer unfair labor practices under the National Act? They are protected by the discretion vested in the National Board with respect to ordering reinstatement. The State Board has a similar discretion to neutralize the effect of an employer unfair labor practice.

It is asserted that this alleged conflict is sharply outlined by the ruling of this Court in the case of *National Labor Rel. Bd. v. Mackay Radio & Telegraph Co.*, (1938) 304 U. S. 333, 58 S. Ct. 904, 82 L. ed. 1381. The assumption seems to be that there is no scope under the State Act for the operation of the principle of the *Mackay Radio & Telegraph Co. Case*, *supra*. The appellants do not show wherein there is not any scope for the operation of the principle of that case. There is full scope for the operation of the principle of the *McKay Radio & Tel. Co. Case* under

the State Act and the Wisconsin Supreme Court has specifically recognized such to be true. *Appleton Chair Corp. v. United Brotherhood, etc.*, (Dec. 1941) 239 Wis. 337, 1 N.W. (2) 188. In this case the court said at pages 342-343:

"In dealing with this matter of labor disputes the legislature has recognized a public interest in the relation between employer and employee. It grows out of the employment and the operation of the industry of the employer. The enactments in relation thereto do not destroy nor are they calculated to invade contract rights, but they do seek to protect the public against unfair labor practices and to foster the continuance of that relation in which the public is interested. *Wisconsin Labor R. Board v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N.W. 673. It has been definitely declared that the relation shall not be dissolved because of differing ideas as to the right of collective bargaining or union membership. It is an established and justified rule which gives the authority to the labor board to determine, in a labor dispute over wages or working conditions, whether the act of an employee or employees is a complete and irrevocable termination of the employee status. Bitterness engendered at such time might lead either side to act in utter disregard of the public interest which the legislation has declared shall be protected. As pointed out in the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, 237 Wis. 164, 183, 295 N.W. 791, the legislature deals with a labor dispute, not primarily as a method of enforcing private rights, but to enforce the public right as well. In that case it was considered, 'in view of the large discretionary power committed to the board, that the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order' of the board. Appellant urges a review of the ruling

in that case. But there is a direct relation between continuity of the relation of employer and employee and the public interest. It is the order of the board which determines the status and relative rights of the parties. The findings merely furnish the factual situation to which the board in the exercise of its discretion applies the law. The existence of a certain fact does not of itself require the board to reach a certain result. Such an interpretation would deprive the board of the power to do anything but find the facts. Sec. 111.07 (4), Stats., says that 'final orders may' do the things stated. It does not say the board shall do them. It clearly vests in the board a power which it may exercise according to its discretion. In furtherance of public policy where there are unfair labor practices on the part of both employer and employee the board by reason of its disinterested position is authorized to order the remedy most consistent with the public interest. We are of the opinion that the correct rule was announced in the *Allen-Bradley Case*, *supra*."

3. The alleged conflict as to rights of minority to bargain collectively.

This argument is grounded upon the provisions of sec. 111.06 (1) (e) of the Wisconsin Act which makes it an unfair labor practice for any employer

"(e) To bargain collectively with the representatives of less than a majority of his employees in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1) (c) of this section."

In connection with this argument it should be noted that there is no provision in the National Act making it an

unfair labor practice to refuse to bargain collectively with a minority union. It was held in *Consolidated Edison Company Case*, supra, that there was nothing in the national Act prohibiting an employer from bargaining collectively with a minority with respect to wages, hours and working conditions for its members only. Neither is there any provision in the national Act making it compulsory upon the employer to bargain with such minority union with respect to wages, hours or working conditions for its members only. Such is a matter which is entirely optional with the employer.

The National Act does not confer a right in this regard. It simply does not prohibit collective bargaining with a minority. In this respect, even though the appellants were correct in their interpretation of sec. 111.06 (1) (e) of the Wisconsin Act (which they are not), there would be nothing prohibiting a State from passing legislation prohibiting an employer from bargaining collectively (in the sense which appellants use the term) with a minority group for its members only. Such legislation would not spell conflict. It would seem that such legislation would be entirely analagous to the Missouri Bucket Shop legislation involved in *Dickson v. Uhlmann Grain Co.*, (1933) 288 U. S. 188, 53 S. Ct. 362, 77 L. ed. 691, and that the principle of that case would be controlling. In that case it was alleged that the provisions of the Missouri Bucket Shop Law were in conflict with the Federal Grain Futures Act of September 21, 1922; Ch. 369, 42 Stat. 998. In upholding the Missouri statute, Mr. Justice Brandeis, speaking for the majority, said (pp. 198-200):

"The federal act declares that contracts for the future delivery of grain shall be unlawful unless the

prescribed conditions are complied with. It does not provide that if these conditions have been complied with, the contracts or the transactions out of which they arose, shall be valid. It does not purport to validate any dealings. * * * But it evinced no intention to authorize all future trading if its regulations were complied with. * * *"

Whether or not the foregoing is the applicable principle is immaterial, as sec. 111.06 (1) (e) does not have the import which appellants attach to it.

There is no provision in the State Act making it an unfair labor practice to bargain with a minority union with respect to wages, hours and working conditions for its members *only*. Nor is there anything in the State Act making it compulsory for an employer to so bargain. This is the exact situation under the National Act.

The foregoing observations are apparent when sec. 111.06 (1) (e) of the State Act is read in connection with sec. 111.02 (5) defining the term collective bargaining, which reads as follows:

"(5) 'Collective bargaining' is the negotiating by an employer and a majority of his employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation."

There is no provision in the National Act defining the term "collective bargaining." The State Act simply does not recognize bargaining with a minority union with respect to wages, hours or working conditions of its members only as "collective bargaining." Collective bargaining under the

State Act does not begin until there is a majority union. Hence, when sec. 111.06 (1) (e) prohibits collective bargaining with the representatives of less than a majority of the employees in a collective bargaining unit, what said section does is merely to prohibit the making of a contract with a minority union with respect to wages, hours and working conditions for all employees in the bargaining unit. There is no difference between the National Act and the State Act in this regard. The Board has never considered sec. 111.06 (1) (e), when read in connection with sec. 111.02 (5), to prohibit a minority union from bargaining with respect to wages, hours and working conditions with respect to its members only. The Board has applied the State Act exactly as the National Act was applied by this Court in *Consolidated Edison Co. v. National L. R. Bd.*, (1938) 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126.

In the performance of its conciliation functions under the Act the Board has continuously encouraged what appellants refer to as collective bargaining contracts made with minorities in a collective bargaining unit when such contracts are made with respect to its members only.

4. The alleged conflict as to the appropriate bargaining unit.

Appellants' entire argument upon this branch of the case is predicated upon an erroneous premise. The premise is that if the State sets up a craft unit and recognizes same, such unit is entitled to recognition under the State Law even though the National Board may set up an industrial unit as the exclusive bargaining unit. The Supreme Court in its opinion in this case (R. 44, 48) specifically recognizes

that any action taken by the National Board determining the appropriate unit is final and conclusive. Just wherein would prior State Board action create any confusion? The National Board oftentimes establishes a unit and subsequently establishes another unit. Certainly, up until the time that the National Board acts it is better to have some unit established which is entitled to recognition than to have no unit established. If a definite unit is established that is entitled to recognition, a long step has been made in permitting collective bargaining to function. Employers not inclined to accept the principle of collective bargaining can throttle the process when no unit entitled to recognition by law has been definitely established. There would appear to be no reason at all why the State should not establish units in accordance with the wishes of the affected employees and pursue such policy up to a point where the Federal Government, acting pursuant to its superior authority and through its agency, determines that some other unit is a more appropriate collective bargaining unit than that which the affected employees themselves want.

Further, if the two acts were identical in language and vested the same discretion in the two Boards, there would be no more and no less conflict. An uncontrolled discretion on the part of two Boards having an absolute discretion offers quite as much opportunity for conflict as two Acts, one of which gives an uncontrolled discretion, see *American Fed. of Labor v. Nat'l. L. R. Bd.*, 308 U. S. 401, 84 L. ed. 347, 60 S. Ct. 300 (1941) and the other of which does not give such an uncontrolled discretion.

5. The so-called major conflict of the unfair labor practices of employees and unions.

Appellants' argument upon this point of the case is most difficult to follow. The unfair labor practices of employees and unions is denominated a major conflict. The Congress, in enacting the National Labor Relations Act, sought to remove *one* of the issues most provocative of industrial strife, namely that of forbidding employers to interfere with the development of employee organization and thus bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which *the employer cannot trade upon the economic weakness of his employees*. See House Committee Report, No. 1147, 74th Congress, 1st session, page 16, quoted in appellants' brief at page 40. The National Act by its terms covers only the field of employer unfair labor practices,—a very small segment of the field of labor relations. By reference to this Committee Report, it seems to be argued that the Congress considered the advisability or inadvisability of covering the field of employee and third person unfair labor practices and deemed it unnecessary and unwise to include such employee and third person unfair labor practices in the National Act; by thus considering and rejecting, appellants appear to argue, although they are careful not to say so, that such consideration and such rejection is tantamount to a declaration that the states are prohibited from passing a labor relations act covering employee and third person unfair labor practices. By thus considering and rejecting, the Congress pre-empted the entire field of labor relations. By thus considering and rejecting, Congress in effect legislated.

The argument carried to its logical conclusion necessarily means that the Congress by considering and rejecting usurped the entire police power of the state in the field of industrial relations. Failure to act has conferred rights on employees and third persons. Failure to act has conferred rights on employees and others to do any and all of those things denounced as unfair labor practices in the Wisconsin Act. As the states cannot deal with the problem, the Congress has conferred upon employees the right to intimidate an employee in the enjoyment of his legal rights; the right to intimidate an employee's family; the right to picket the domicile of an employee; the right to injure the person or property of such employee or his family; the right to mass picket; the right to commit acts of violence; and so on, and so forth. See opinion of the Wis. Supreme Court, R. 49.

The Congress either has or has not pre-empted the field of labor relations by the enactment of the National Labor Relations Act. If it has pre-empted the field, the State police power is gone. And it matters not in what form the police power is exerted. If the Congress has not pre-empted the field, the State may exercise its police power, provided no undue or discriminatory burdens are put upon interstate commerce unless a repugnance or conflict between Federal and State action is so direct and positive that the two Acts cannot be reconciled or consistently stand together. *Kelly v. Washington*, (1937) 302 U. S. 1, 58 S. Ct. 87, 82 L. ed. 3. No pretense is made that the Wisconsin Act places any undue or discriminatory burdens upon interstate commerce. Actually, by promoting industrial peace (the same thing the National Act promotes) it promotes interstate commerce and in effect removes interference with interstate commerce. Under such circumstances it is all the more clear that the Act should be sus-

tained, *Standard Oil Co. v. Tennessee*, (1910) 217 U. S. 413, 30 S. Ct. 543, 54 L. ed. 817, unless it is shown that the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled and consistently stand together.

The appellants seem to appreciate the absurd consequences that follow an analysis of their argument with respect to employee and third person unfair labor practices to its logical conclusion. To avoid the absurd consequences they assert that they do not contend that the State police power is gone. See appellants' brief pp. 20 and 51. The argument seems to be that the State may deal with employees intimidating employees in the enjoyment of their legal rights, intimidating an employee's family, injuring the person or property of employees and their families, mass picketing, acts of violence, etc., through the machinery of the civil and criminal law, including injunctions. But by the passage of the National Labor Relations Act, it is argued, the State may not exercise its police power to prevent industrial strife by means of the administrative device,—by means of providing a convenient, expeditious and impartial tribunal by which the major interests in industrial strife may have their respective rights and obligations adjudicated. The administrative device which the Congress has deemed the most effective method of preventing industrial strife may not be used by the States,—the sovereigns primarily concerned with industrial strife and preservation of law and order—merely because the Congress, within a very limited area has deemed the administrative device the most effective means of dealing with employer unfair labor practices which are provocative of industrial strife. The State either has police power to deal with employee and third person unfair labor prac-

tices denounced as such by sec. 111.06, (2) and (3), or it has not. If it has such police power, the matter of how that power shall be exercised is entirely one within the legislature's range of choice. *Tigner v. Texas*, (1940) 310 U. S. 141, 60 S. Ct. 879, 84 L. ed. 1124.

When the appellants concede that the State has police power they concede that the field is not pre-empted. If pre-empted, in a field in which the Congress has power to pre-empt, the State police power is gone, and the State may not supplement. Supplementation in a pre-empted field spells conflict. If the field is not pre-empted, the States may supplement except where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or consistently stand together. Obviously, if the State has police power to deal with matters covered by sec. 111.06 (2) and (3) of the Act (employee and third person unfair labor practices) there can be no irreconcilable conflict with the National Act in the constitutional sense as all such matters are entirely beyond the scope of the National Act. The National Act does not even deal with such practices.

The appellants make no reference to sec. 111.04 of the Wisconsin Act, which provides:

"Rights of employes. Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

This is the same policy set forth in the Norris-La-Guardia Act. U.S.C.A., Tit. 29, sec. 102, insofar as material provides:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, *though he should be free to decline to associate with his fellows*, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted." (*Italics ours*)

The appellants assert: (B. p. 22)

"* * * The National Labor Relations Act is only part of a whole legislative program that includes as well such safeguards of collective bargaining as the Norris LaGuardia Anti-Injunction Act, the Wage-Hour law and the Walsh-Healey Act. See *Aper Hosiery Co. v. Loder*, 310 U. S. 469, 498, 60 S. Ct. 982, 998 n. 24."

If it is the National policy that a worker should be free to decline to associate with his fellows as expressed in the declaration of policy in the Norris-LaGuardia Act, just where is there any conflict in policy when the State recognizes this to be true and sets up machinery to make the policy and concept real?

As appellants are unable to spell out any irreconcilable conflict in the employee and third person unfair labor practice provisions of the State Act (sec. 11.06 (2) and (3)), they draw upon the definition of an employee (sec. 111.02 (3) of the State Act) in an effort to spell out a conflict. This definition is of no significance in the administration of the Act as was expressly held in *Appleton Chair Corp. v. United Brotherhood, etc.*, 239 Wis. 337, 1 N. W. (2) 188 (Dec., 1941) as well as in the case at bar. *R. 50-52 inc.*

Finally, the appellants resort to sec. 111.07 (4) of the State Act which, insofar as material, provides:

“* * * Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the Board may deem proper. * * *

The fact that the Board *may* exercise such a power is asserted by appellants to present an irreconcilable conflict. There are a number of answers to any such contention. In the first place the Board did not exercise any such power in the instant case. In the second place the

Board has never yet exercised this power. It has never exercised it in dealing with an unfair labor practice case even in those situations where the employer's business has no interstate aspects,—where the National Board would have no conceivable jurisdiction. It has never exercised such powers where the interstate aspects of the employer's business are such as to subject him or it to the jurisdiction of the National Board in a proper case. Under the circumstances the following observations of this Court in *Hicklin v. Coney*, 290 U. S. 169, 78 L. ed. 247, 250 (1933) are most pertinent:

“Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, ‘if any it has under the act,’ and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions. *Stephenson v. Binford*, supra (287 U. S. 251, 277, 77 L. ed. 301, 53 S. Ct. 181, 87 A.L.R. 721).”

In the third place there is no provision in the Act which by the mere force of its enactment presents any question of conflict. As was stated by the Supreme Court of the State in this case (R. 52) and reiterated in the *Appleton Chair Corp. case*, supra:

“As already stated, the manner and the extent to which the act shall apply in a particular case pending before it is committed to the discretion of the Board. Its commands are found in the order, which determines the status and obligations of all parties to the controversy, not in the findings. In the Board's order under review, there is no provision which sus-

pends the status as employees of the fourteen individual appellants found guilty of unfair labor practices. In this case for the reasons stated there is no conflict in regard to employe status."

Appellants assert that the Court held that the Board had power to suspend the bargaining privileges of a union with respect to employers who, in a proper case, would be subject to the jurisdiction of the National Board and that the Court held the same with respect to suspending the bargaining privileges of employees of an employer, who, in a proper case would be subject to the jurisdiction of the National Board. The Court held no such thing as is apparent from the quotation above cited. The Court held that no suspension of status for purposes of administering the Wis. Act had been exercised in the particular case and that for that reason no question of conflict was presented in the case at bar.

It is further asserted that judicial decisions upholding rulings of the Federal Board have established that the employee status of strikers for purposes of collective bargaining, continues regardless of minor acts of disorder (Appellants' Brief, p. 41). Such is not an accurate statement of the holdings. The question presented in the cases cited was whether the National Board in the exercise of its discretionary power, with respect to effectuating the purposes of the National Act, *had power to order reinstatement of employees, even though they had violated laws of the State by committing acts of assault and battery and breaches of the peace.* *Nat'l. L. R. Bd. v. Stackpole Carbon Co.*, 105 Fed. (2) 167 (1939), *Nat'l. L. R. Bd. v. Carlisle Lumber Co.*, 99 Fed. (2) 533 (1938) and *Republic Steel Corp. v. Nat'l. L. R. Bd.*, 107 Fed. (2) 472 (1939), hold that

an order of reinstatement with respect to such employees is within the discretionary power of the National Board.

Insofar as we can find, this Court has never as yet passed upon the question. It denied certiorari in the above cases but this Court has repeatedly held that a denial of certiorari imports no expression of opinion upon the merits of a case. *Hamilton-Brown Shoe Co. v. Wolf Brothers*, (1916) 240 U. S. 251, 258, 36 S. Ct. 269, 60 L. ed. 629; *Atlantic Coast Line R. Co. v. Powe*, (1931) 283 U. S. 401, 403, 51 S. Ct. 498, 75 L. ed. 1142; *Fur Workers Union, Local No. 72 v. Fur Workers Union*, (1939) 105 F. (2) 1.

Nat'l. L. R. Bd. v. Fansteel Metal. Corp., 306 U. S. 240, 256, 83 L. ed. 627, 59 S. Ct. 490 (1939) presents a cognate situation. In that case there was one group of employees that engaged in a sit-down strike and seized the employer's property. This group was formerly discharged by the employer. There was another group of employees who assisted the first group from the outside by way of bringing them things to eat, bedding, food, drink, etc. This latter group was not formerly discharged. The National Board ordered reinstatement as to both groups. This Court held that the order was beyond the power of the Board as to both groups. The Court said: (p. 256)

"Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the union committee 'to take over and hold two of the respondent's key buildings'. It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of the 'right to strike' to which the act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the build-

ings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to compulsion they took a position outside of the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve. * * *

"We repeat that the fundamental policy of the act is to safeguard the rights of the self-organization and collective bargaining and thus, by the promotion of industrial peace, to remove obstructions to the free flow of commerce as defined in the act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees rights." (Italics ours)

In this state of the law, it is by no means clear that the National Board, in the exercise of its discretion, has power to order reinstatement of employees, who are guilty of unlawful conduct in the carrying on of a strike. Even if the National Board has such power, it can hardly be said that it is a national policy to place a premium upon unlawful conduct in the conduct of a strike.

Furthermore, if a state were to enact a law making it mandatory upon its administrative agency to deny reinstatement of employees where they have resorted to force and violence in defiance of the laws of the state, could it be said that such an exercise of the police power of the state presents any question of irreconcilable conflict in the

constitutional sense with the National Labor Relations Act? The State, in the exercise of its police power, would be endeavoring to exercise effectively one of its major functions of government, namely the preservation of law and order. If a state were to enact such a law and to adopt such a policy would the National Board, in the exercise of its remedial function under the National Labor Relations Act, have power to order reinstatement in defiance of the policy of the state law—in defiance of a State policy which has such an intimate relation to one of its major functions of State government? Would such an order, under such circumstances, bear such a close and substantial relation to interstate commerce as to justify the federal interference with state policy? No one knows the answer to that question. It is most difficult to predicate irreconcilable concepts in the constitutional sense where the extent of federal power, in relation to state power, is as yet undetermined.

On p. 45 of their brief appellants state:

"The conflicts between the two acts boil down to one essential point: the policy of the Federal Act is to require perfected collective bargaining for the breach of its provisions; whereas the policy of the State Act is to require the forfeiture of collective bargaining rights as a penalty for the breach of its provisions. Where the Federal Act requires employers who have committed unfair labor practices to cease and desist therefrom, and to accept collective bargaining through freely chosen representatives of their employees, the State Act requires, as a penalty, employees who have violated local police laws to forego collective bargaining privileges and rights."

We have shown that the State Act requires no such penalty. The conflicts are accordingly boiled down to nothing.

Furthermore, Sec. 111.17 provides:

"CONFLICT OF PROVISIONS; EFFECT. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this chapter this chapter shall prevail, provided that in any situation where the provisions of this chapter cannot be validly enforced the provisions of such other statutes or laws shall apply."

Sec. 111.18 provides:

"SEPARABILITY OF PROVISIONS. If any provision of this chapter or the application of such provision to any person or circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

As was said by the Wisconsin Court in this case (R., 51) and reiterated in *Appleton Chair Corp. v. United Brotherhood, etc.*, 239 Wis. 337, 343 (1941), it is considered

"* * * 'in view of the large discretionary power committed to the board, that the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order' of the board. * * *"

The Board has ample power, both by virtue of discretion committed to it, and secs. 111.17 and 111.18, above quoted, to so administer the Act as never to present any serious question of conflict with any national policy evidenced in the National Labor Relations Act. It cannot be presumed

that the Board will abuse its discretion. It did not do so in the instant case. It will be time enough to deal with any abuse of discretion if and when a case arises presenting such abuse.

POINT V

THE ORDER OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD, UPHELD BY THE STATE COURTS, WAS NOT BEYOND THE JURISDICTION OF THE STATE BOARD.

Appellants's argument contra upon this point is grounded upon the following proposition:

"* * * When the State Board took jurisdiction of this case, despite the objections of the appellant, it assumed to deal with matters that were the subject of the exercise of constitutional powers by Congress. The State Act authorized the Board to deprive the individual appellants of their employee status for the purposes of collective bargaining. It authorized the Board to deprive the Union of its capacity to act as an exclusive collective bargaining representative for a period up to one year."

The appellants present nothing new upon this point of the case. The entire argument is grounded upon a so-called irreconcilable conflict between the State Act and the National Act because of the limited discretionary power vested in the "Board" by Section 111.07(4) to suspend rights, immunities, privileges or remedies granted or afforded by the Act for not more than one year. We say "limited" because the Section has to be read in connection with Sec-

tion 111.17 and 111.18 Statutes. In any situation where the Board cannot validly exercise such power, these sections prevent it from exercising such power. Contrary to appellant's assertion, the Wisconsin Court did not hold that the Board could exercise such power in the instant case. It simply held that the Board did not exercise any power under this provision of the Act and that therefore no question of conflict was presented in the case at bar.

Furthermore, the concept that this particular provision of the Act goes to the jurisdiction of the Board is a new concept of jurisdiction. The Board obviously had jurisdiction. The only question that could be presented was whether in relation to this particular controversy, the Board could exercise any discretion granted by this particular clause of the Act. That question would not go to the jurisdiction of the Board. It would simply go to the *power* of the Board to exercise any discretion under this particular clause under the facts of the instant case. The Board did not attempt to exercise any power that it may have under this particular provision in the instant case. Nor has it ever in any other case ever exercised whatever powers are conferred upon it by this particular provision. It will be time enough to deal with the constitutional extent of Board power under this provision if and when the Board acts under it.

Furthermore, assume that the Board were to suspend the rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act for a certain period of time with respect to individual employees. It is inaccurate to state that such suspension deprives the individuals of their employee status for the purposes of collective bargaining. Such a suspension would simply mean that so far as those employees are concerned, they are in the same position

they would be in if Wisconsin had no law protecting collective bargaining rights. The appellants urge that the field is preempted and that Wisconsin cannot pass a law protecting collective bargaining rights. If the Board were to suspend the rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act with respect to the employees found guilty of unfair practices in the instant case, they would have just what they seek to establish—no protection except the protection of the National Act. They would not by such suspension lose collective bargaining rights. They would lose protection of the Wisconsin Act—just what they want and seek to establish in this case. What then can be their real complaint in relation to Board power to suspend rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act?

It is asserted that the State Board at the time of its entry of its final order in this case considered that these individuals by the commission of unfair labor practices forfeited their employee status. This is not true. The only time that the Board ever took that position was in the separate decision filed by the Board in *Hotel and R. E. I. Alliance et al. v. W. E. R. B. et al.*, 236 Wis. 329, 295 N. W. 634.

However, such language was not necessary to a decision in that case because the employees involved had engaged in conduct which justified the employer in severing the employee relationship. It was apparent from the facts of the case that the employer had treated such employees as no longer employees of the company. The positions had been filled by the hiring of other employees. The conduct involved in filling such positions by other employees was justifiable conduct and well within the employ-

er's rights under the decision of *Nat'l. L. R. Bd. v. MacKay Radio & T. Co.*, 304 U. S. 333, 82 L. ed. 1381 (1938).

At the time the Board entered its final order in the case at bar, it took a position in relation to this problem exactly similar to that taken by the Court in the instant case,—a position confirmed and adhered to in the *Appleton Chair Corp. case*, *supra*. The Board urged this exact construction of the Act in its brief filed in the case at bar in the Supreme Court of the State. The language quoted from the Supreme Court's opinion in *Hotel and R. E. I. Alliance et al. v. W. E. R. B. et al.*, 236 Wis. 329, 295 N. W. 634 (appellant's brief page 46) came down many months after the Board had entered its final order in the case at bar and in no wise influenced the Board in making its final order in the instant case.

Such matters are not of any great import—certainly they are not of constitutional proportions—but the appellants are in error when they assert that the Board thought that it was depriving the individual employees of rights, immunities, privileges and remedies granted or afforded by the Wisconsin Act by its mere conclusion that these employees had committed unfair labor practices. It thought no such thing.

POINT VI

THE WISCONSIN EMPLOYMENT PEACE ACT IS NOT AN UNCONSTITUTIONAL EXERCISE OF THE POLICE POWER OF THE STATE.

The appellants are precluded from arguing any such question. They never challenged the validity of the Wisconsin Employment Peace Act as an Act. The closest appellants have ever come to raising any question is that of a feared invalid application of a concededly constitutional statute. They now attempt to urge that in spite of the express provisions of sec. 111.17 and 111.18, if any provision of the Act cannot be applied to all situations the entire Act must fall. The contention is obviously without merit. The observations of this Court in *Watson et al. v. Buck et al.*, 313 U. S. 387, 85 L. ed. 1416, 61 S. Ct. 962 (1941) and in *Railroad Comm. of Texas v. Pullman Co.*, 312 U. S. 946, 85 L. ed. 97, 61 S. Ct. 643 (1941) would seem to effectively dispose of the point adversely to appellants' contention. See also *Green v. Phillips Petroleum Co.*, 119 Fed. (2) 466 (1941).

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court for Milwaukee Coun-

ty, Wisconsin, enforcing the order of the Wisconsin Employment Relations Board should be affirmed.

Respectfully submitted,

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CHARTER

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1114, UNITED
ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA; ET AL.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS
BOARD AND ALLEN-BRADLEY COMPANY,

Respondents.

Appeal From the Supreme Court of the State of Wisconsin

**BRIEF OF RESPONDENT
ALLEN-BRADLEY COMPANY**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 252

**ALLEN-BRADLEY LOCAL NO. 1111, UNITED
ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA, ET AL.,**

Appellants,

vs.

**WISCONSIN EMPLOYMENT RELATIONS
BOARD AND ALLEN-BRADLEY COMPANY,**

Respondents.

Appeal From the Supreme Court of the State of Wisconsin

**BRIEF OF RESPONDENT
ALLEN-BRADLEY COMPANY**

OPINIONS BELOW

This is an appeal from the decision of the Supreme Court of the State of Wisconsin, reported in 237 Wis. 164, 295 N.W. 791. It is also printed in the Record at pp. 37-54. The Opinion of the Circuit Court of Milwaukee County is not reported, but appears in the Record at pp. 24-26.

STATEMENT OF THE CASE

We desire to add the following to appellants' Statement of the Case:

This is an appeal from a judgment of the State Supreme Court, affirming the judgment of the Circuit Court of Milwaukee County, which sustained and enforced a Final Order of the Wisconsin Employment Relations Board (herein sometimes called the "Wisconsin Board"). The Order was entered in a proceeding commenced before the Wisconsin Board by respondent Allen-Bradley Company (herein sometimes called the "Company"). The Company's complaint charged appellants (herein sometimes called the "Union and its members") with violence, threats, mass picketing, interference with entrance to, and egress from, the Company's factory, and obstruction with the free use of public streets and sidewalks around its factory, which were unfair labor practices under subsections (a), (f), and (h) of Section 111.06(2) of the Wisconsin Employment Peace Act (herein sometimes called the "Wisconsin Act"). (R. 28-30)

The Wisconsin Act involved in this case is the 1939 Act. That Act repealed a previous Wisconsin Labor Relations Act passed in 1937, which was practically a counterpart of the National Act.

The Union and its members went on strike on May 10, 1939. The strike lasted about three months. During all of this period, as found by the Wisconsin Board, the Company continued to operate its plant, and the Union and its members carried on a continued course of mass picketing, violence, threats, assaults, property damage, and obstruction of streets and sidewalks surrounding the

factory for the purpose of hindering and preventing the pursuit of lawful work and employment by those employees who desired so to do. (R. 14) The Judgment appealed from ordered the Union and its members to cease and desist from:

- (a) Mass picketing at or near the Company's plant;
- (b) Threatening Company employees with physical injury, property damage, or otherwise;
- (c) Obstructing or interfering with entrance to or egress from the Company's plant;
- (d) Obstructing or interfering with the free use of streets and sidewalks around the plant;
- (e) Picketing the domiciles of Company employees. (R. 27-28)

The Board's Order, and the Judgment enforcing it, contained no provision directed to the 14 individuals named as appellants. As to them, the action of the Wisconsin Board was limited to: (a) The making of Findings of Fact that they committed violence and other acts of misconduct; and (b) a Conclusion of Law that they were guilty of unfair labor practices by reason of such acts. (R. 13-17)

In the Wisconsin Supreme Court, the appellants did not raise the issue of pre-emption of this field of legislation now raised in this Court. The opinion of the Wisconsin Supreme Court on this point states:

"Upon this appeal no question is raised as to the constitutionality of the Wisconsin Employment Peace Act, * * * pursuant to which the proceeding under consideration was had, except that it is in conflict with the National Labor Relations Act. * * * Stated in the language of the brief, the appellants contend

"That the Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce."

In their present Assignments of Errors and Specifications of Errors to be urged on this appeal, appellants now take the contrary position and assert that in enacting the National Act, Congress preempted the subject of labor relations, and that, therefore, the entire Wisconsin Act is unconstitutional on its face. (Specification of Errors To Be Urged No. 4; Appellants' Brief, p. 9)

Appellants concede that the National Act regulates only the conduct of employers and creates only *employer* unfair labor practices. In spite of this, they contend that the specific sections of the Wisconsin Act here involved, which define and create *employee* unfair labor practices (Section 111.06(2)) and *Union* unfair labor practices (Section 111.06(3)) are, nevertheless, in direct conflict with the National Act, and therefore, unconstitutional. (Specification of Errors To Be Urged No. 3 and No. 6)

Although it was stipulated that the business of the Company in interstate commerce was in sufficient quantity to render it subject to the jurisdiction of the National Act in a proper case, no proceedings under that Act have been instituted or were pending at any time during the pendency of this case. (R. 36, 48)

The Decision of the Wisconsin Supreme Court

The Wisconsin Supreme Court held that:

(a) The Wisconsin Act deals with labor relations "in the exercise of the police power of the State." (R. 48)

(b) The National Act was drawn with consummate skill "for the declared purpose of regulating and protecting interstate commerce and yet at the same time leaving the field of proper state action unrestricted so far as possible." (R. 43)

(c) We must first consider the purpose and scope of the National Act "for the reason that wherever it applies, it excludes State action from the occupied field. Upon this proposition there is no disagreement." (R. 42)

(d) "To the extent that the orders of the National Labor Relations Board apply to a particular controversy, the jurisdiction of the State authorities both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any State authority to the contrary notwithstanding." (R. 48)

(e) " * * * Congress does not seek in the National Labor Relations Act to deal with labor relations generally. It deals with labor relations only so far as, in its opinion, it is necessary to protect interstate commerce from being impeded or obstructed by unfair labor practices on the part of employers." (R. 46)

(f) The National Act had not preempted the field and " * * * The action of Congress leaves to the State full authority to deal with labor relations generally.

Congress exercises its power in the interest of interstate commerce. With that subject the State has nothing to do. Its power to regulate labor relations is derived from an entirely different source,—the power to promote the peace, morals, health, good order and general welfare of the people as a whole. It may not, however, in the exercise of that power encroach upon the Federal domain." (R. 49)

(g) On the issue of alleged conflict between the two Acts, the Court construed the Wisconsin Act to provide that the employe status of the 14 individual appellants was not affected because the Board's Order contained "no provision which suspends the (their) status * * *" and the findings of violence, etc., and the Conclusion of Law as to guilt of unfair labor practice had no such effect under the Act. (R. 50-52)

(h) The Court held also that there was no conflict between the two Acts because of difference in the definition of "employe" (Section 111.02(3) of the Wisconsin Act and Section 2(3) of the National Act), because "these definitions apply only for the purpose of the Act in which they are found," (R. 52) and further because "No matter how arrived at by the Boards there can be no conflict if there is none in the orders dealing with the same labor dispute." (R. 52)

(i) As to the other respects in which appellants claimed the two Acts to be in conflict, the Court held that the State police power "is not destroyed by Federal action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by

the National Labor Relations Act. Its power is suspended so far as is necessary to give effect to that act. * * * If the National Labor Relations Act is repealed, the power of the state over labor relations will be the same as it was before the act was passed. If the Interstate Commerce Act should be repealed the state's power over interstate commerce would not be enlarged. It might have greater latitude in dealing with intra-state commerce but its jurisdiction would be over intra-state commerce, not over interstate commerce." That, therefore, there was no conflict because the National Board had not acted to apply the National Act in this case. (R. 53)

Issue Involved

The Wisconsin Act applies to all employers and employees in the State, whether engaged in intrastate commerce or in interstate commerce. There is no contention that the Act is unconstitutional with respect to employers and employees engaged in intrastate commerce. Therefore, as stated by the Wisconsin Supreme Court, the appellants are really not arguing that the Act is unconstitutional, but rather that it can have no application to an employer who *might* be subject to the National Act, because the jurisdiction of the National Act has preempted the field of labor relations in cases where the employer is carrying on an industry in interstate commerce. (R. 41)

The Order and Judgment here appealed from protect the Company and its employees from acts of violence, intimidation, and coercion; acts which are wrongful and unlawful in any society. Narrowed down to its essentials, therefore, the issue in this case is whether, by enacting the National Act, Congress has deprived the State of Wisconsin of its right to exercise its police power to

protect its citizens against such inherently wrongful conduct by a civil remedy to be administered through the Wisconsin Board and the State Courts.

And the real controversy arises over the validity of the specific portions of the Wisconsin Act on which the Order is based (Section 111.06(2) (a) and (f) and (3)) as applied to the appellants.

SUMMARY OF ARGUMENT

I.

The enactment of the National Act does not deprive the State of its police power in the field of labor relations. The intention of Congress to exclude the exercise of such power must be clear, and the question of intent is interwoven with the question of whether there is actual conflict. All doubts will be resolved in favor of sustaining the State law. The nature of the subject requires an especially clear showing of both intent and actual conflict.

Generally this field is one for exclusive State regulation. Congress was entering a new and uncharted field in which its jurisdiction was doubtful. It naturally proceeded cautiously and in a limited way. It certainly did not intend to affect the many State laws already in force affecting labor relations.

The National Act was intentionally narrow in its scope. It did not create the right of self-organization or to bargain collectively. The Congressional Committee Reports demonstrate the limited extent of Congress' entrance into this field of legislation.

Congress expressly refrained from regulating strikes or the conduct of employees in strikes. It considered

such legislation unnecessary, because existing State and Federal remedies were adequate. The Wisconsin Act, therefore, provides a remedy wholly outside of the field of the national legislation in the interest of peace and order in Wisconsin.

Since the limits of Federal jurisdiction were doubtful and uncertain, it is a violent assumption that Congress intended to exclude State legislation in this field.

II.

This case could not arise under the National Act, which regulates only employer unfair labor practices. Four of the five Sections of the Act which appellants claim are in conflict with the National Act are not involved in this case. The Court will decide only the constitutional issues presented and will not anticipate questions of constitutional law nor formulate rules broader than required by the case at bar.

The Wisconsin Court construed the Act as not affecting the employe status of appellants in the absence of a Board Order terminating such status. Such construction is conclusive in this Court.

The Wisconsin Court held that the definition of "employe" in the Wisconsin Act applies only for the purposes of that Act. Hence, there is no conflict with the National Act in this respect.

In so far as the Wisconsin Act gives power to suspend rights and remedies, it is clear: (1) That the Order here did not suspend any rights or remedies, and (2) The only rights or remedies which can be suspended are those granted by the Wisconsin Act.

Such suspension can have no effect in administering the National Act, as expressly held by the Wisconsin Court.

The right of a striking employee to continue as such is not an absolute right even under the National Act. It may be terminated for wrongful conduct, and the test of such wrongful conduct generally is based upon State law.

It is difficult to understand how an order forbidding violence can unlawfully interfere with the right of self-organization or to collectively bargain, as appellants contend.

The alleged conflict in public policy between the two Acts is entirely fanciful. As to other alleged conflicts, the sections of the Wisconsin Act in question can affect only the administration of the State Act, and as held by the Wisconsin Court, whenever the National Board takes jurisdiction, the State law and Orders made under it, must give way.

Appellants' entire Brief is predicated on the false premise that an Order forbidding violence per se interferes with self-organization and collective bargaining.

ARGUMENT

I.

The Enactment of the National Act Does Not Deprive the State of its Police Power in This Field of Regulation.

- (a) The intention of Congress to exclude the exercise of police power must be clear. The determination of that question is interwoven with the question of whether actual conflict between the two Acts exists.

There is nothing in the National Act which expressly forbids State legislation. Under such situation, it is, of course, well settled that

(1) The intent of Congress to exclude States from exercising their police power must be clearly shown;

(2) The intent to supersede such police power will not be implied unless there is such repugnance and conflict between the two Acts that they cannot be reconciled or consistently stand together; and

(3) If, in construing the Federal Act as a whole, there is room for doubt, the established rule of construction requires the Court to resolve such doubt in favor of sustaining the validity of the State law.

In *Kelly vs. Washington*, 302 U.S. 9, 10, (1937), this Court, speaking through Chief Justice Hughes, said:

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U.S. 352, 402. States are thus enabled

to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

In *Reid vs. Colorado*, 187 U.S. 137, 148, the principle was thus emphatically stated:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."

In *Savage vs. Jones*, 225 U.S. 501, 533, a Federal Act dealt with the subject of adulterated and misbranded foods. It covered any false or misleading statements as to ingredients. It did not require a disclosure of the ingredients. The State of Indiana enacted a Statute dealing with the disclosure of the ingredients, in other words, with the matter omitted from the Federal Act. This Court held that the State requirement could be sustained without impairing the operation of the Federal Act as to the matters with which that Act dealt, and in so doing, this Court said:

"But the intent to supersede the exercise by the State of its police power as to matters not covered

by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. * * * " (p. 533)

In *Mintz vs. Baldwin*, 289 U.S. 346, 350, the issue was the validity of a New York Statute requiring cattle to be certified as free from Bang's disease. The Act was claimed to be in conflict with the Federal Statute known as the Cattle Contagious Disease Act. In sustaining the State law, this Court said:

"The purpose of Congress to supersede or exclude State action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear." (p. 350).

In the *Kelly* case, *supra*, p. 11, the Court stated that this principle applies strongly where the State has exercised its power to protect the lives and health of its people, but that it extends also "to exertions of State power directed to more general purposes," citing *Atchison, T. & S. F. Ry. Co. vs. Railroad Commission*, 283 U.S. 380, 391.

The burden is, therefore, upon the appellants to establish definitely and clearly that by enacting the National Act, Congress intended to exclude the States from this exercise of their police power, and that there is repugnance and conflict between the two Acts, of such a direct and positive nature, that they cannot be reconciled or consistently stand together.

- (b) The nature of the subject matter regulated requires an especially clear showing of such intent and of such conflict.

The regulation of labor relations is a field which, until recently, was generally considered to be exclusively with-

in the regulatory powers of the States. Actually, the direct regulation of labor relations, as such, is still exclusively a State function, because the National Act and similar enactments will be valid, not as a direct regulation of labor relations, but rather as a regulation of interstate commerce.

N. L. R. B. vs. Jones & Laughlin Steel Corp.,
301 U.S. 1, 57 S. Ct. 615;

N. L. R. B. vs. Fansteel Metallurgical Corp., 306
U.S. 240, 59 S. Ct. 490.

In 1937, the Wisconsin Legislature passed a Labor Relations Act (then known as the Wisconsin "Little Wagner Act"), which was a substantial counterpart of the present National Act. The validity of that Statute was before the Wisconsin Supreme Court in the case of *Wisconsin Labor Relations Board vs. Fred Rueping Leather Company*, 228 Wis. 473. The contention was made in that case that the National Act had precluded the State from legislating in this field. The Court, in an able and thorough opinion by Mr. Justice Wickhem overruled that contention. In so doing, the Court, after citing the cases above referred to and others, recognized that in determining the Congressional intent, the nature and the general field of the legislation was an important factor. It pointed out that at the time of the enactment of the National Act:

“... Congress was entering a new and uncharted field, one in which the boundaries of any competency it might have were extremely doubtful. It was already occupied at least in part by State laws passed in exercise of the police power to preserve local peace and good order.” (p. 489)

The Court also said;

“We discover nothing in the legislative history of the bill which later became the National Labor

Relations Act to give comfort or support to the claim that congress intended to exclude the states from the whole field of labor relations so affecting interstate commerce as to warrant federal legislation. These relations had theretofore been considered as properly belonging to the states under the police power. Not only this, but as a result of decisions in *Hammer vs. Dagenhart*, 247 U.S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, and other cases involving the validity of federal child labor acts, as well as the cases of *A. L. A. Schechter Poultry Corp. vs. United States*, 295 U.S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570, and *Carter vs. Carter Coal Co.*, 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160, there was a very substantial doubt whether congress could enter the field at all." (p. 488)

Wisconsin Regulations of Labor Relations

The State of Wisconsin has regulated labor relations in many ways other than the Wisconsin Act in question. Among others are (all references are to Wisconsin Statutes of 1941):

(1) Section 103.51, which states the State's public policy to be that

" * * * Negotiation of terms and conditions of labor should result from *voluntary agreement* between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate

the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Emphasis ours.)

(2) Section 103.52 declares so-called "yellow dog" contracts to be contrary to public policy.

(3) Section 103.53 specifies lawful conduct in labor disputes to include:

- (a) Ceasing or refusing to perform work;
- (b) Becoming or remaining a Union member;
- (c) Paying or giving strike benefits;
- (d) Aiding persons proceeded against in Court;
- (e) Advertising or giving information as to a strike, without intimidation or coercion or other method not involving fraud, violence, breach of the peace, or threat thereof;
- (f) Ceasing to patronize or to employ any person, not, however, to legalize a secondary boycott;
- (g) Assembling peaceably for the doing of any acts above specified or to promote lawful interests;
- (j) Urging or inducing, without fraud, violence, or threat thereof, others to do the above acts;
- (k) Doing in concert any of the above acts;
- (l) Peaceful picketing, singly or in numbers.

(4) Section 103.54 protects officers of Unions and Unions themselves from liability for unlawful acts of individual officers or members, except upon proof by a preponderance of evidence and without the aid of any presumptions of law or fact of both (a) the doing of

such acts by the officers, members, or agents, and (b) actual participation in, or authorization of, such acts or ratification after actual knowledge thereof.

(5) Section 103.55 declares the public policy of the State in labor litigation to be against the easy obtaining of injunctive relief.

(6) Section 103.56 strictly regulates the granting of injunctions in labor litigation in a manner substantially identical to the Federal Norris-LaGuardia Act.

(7) Section 103.61 specifically provides the punishment which may be ordered for contempt for violation of injunctions in labor matters.

(8) Chapter 102 establishes a complete system for payment of workmen's compensation.

(9) Chapter 103 contains 82 sections which, in addition to those above mentioned, regulate many subjects, including hours of labor for women; employment of illiterate minors (Section 103.06); various health regulations incident to employment (Section 103.16 requiring seats for females); minimum wages for girl employees (Section 103.23); hours of work for boy employees (Section 103.24); duties of employers of boys in a street trade (Section 103.27); regulations as to when wages are payable (Section 103.39); hours of labor in construction, etc., of public buildings (Section 103.41); fraudulent advertising for labor (Section 103.43); regulating the payment of wages by checks or other paper than legal money (Section 103.45); regulation of deductions from wages for defective or faulty workmanship (Section 103.455); hours of labor in state institutions (Section 103.47); wages and hours on highway contracts (Section 103.50); general regulations of employment of minors

and women (Section 103.64-66); minimum ages in various employments (Section 103.67); hours of labor in various employments (Section 103.68); minimum ages for hazardous employments (Section 103.69); a permit system on employment of minors (Section 103.70-74); regulating employment of minors in public exhibition (Section 103.78); employment of minors as golf caddies (Section 103.79); regulating the advertising for employment of minors (Section 103.81).

(10) Chapter 104 enacts a minimum wage law.

(11) Chapter 105 regulates employment agencies.

(12) Chapter 106 provides for a system of indentured apprentices.

(13) Chapter 108 creates a system of unemployment reserves and unemployment compensation.

(14) The criminal laws of the State also contain various regulations of labor relations. For example, Section 351.50 requires at least one day's rest in seven as to certain specified occupations, and provides a penalty for violation thereof. Section 343.681 declares it a misdemeanor to combine, for the purpose of wilfully or maliciously injuring another in his trade, business, or profession by any means. Section 343.682 makes it a misdemeanor for two or more employers to combine to blacklist persons seeking employment or to cause the discharge of any employe by blacklisting, etc. Section 343.683 makes it unlawful, by threat, intimidation, force, or coercion, to hinder any person from engaging in lawful work.

It is clear from the foregoing that the regulation of the field of labor relations has many phases and vari-

ations. It is a subject recognized throughout the entire history of this country as one within the police power of the States. A power which consistently has been exercised by the States, and certainly by the State of Wisconsin, to preserve local peace and good order and generally for the betterment of the State and its citizens. Even a casual consideration of the above regulations indicates that if the Wisconsin Act in question is held to be void, such a decision would have a far-reaching effect upon the multitude of State laws in a field which for so long was considered as solely for State regulation.

(c) The National Act intentionally is narrow in its scope.

Appellants approach the issue on the basis that the National Act is a regulation of labor relations; that by enacting it, Congress "has laid down a policy governing labor relations affecting interstate commerce." (Appellants' Brief, p. 9) Counsel argue that the National Act encourages collective bargaining, (Brief, pp. 11, 30) and they point out that Section 111.01 of the Wisconsin Act "omits any positive declaration in favor of promoting collective bargaining." (Brief, p. 31)

These arguments take much too broad a view of the Federal Act and much too narrow a view of the Wisconsin Act and of other Wisconsin Statutes dealing with the subject of labor relations. This is particularly clear in view of Section 103.51 of the Wisconsin Statutes (quoted at page 15) which expressly sets out the State's policy in favor of the promotion of collective bargaining and of full freedom of association and self-organization. Since this is the only Federal law on the subject, it is reasonable to expect to find the national public policy there declared. But, with many State laws

in this field, it is rather extreme to require all State policy to be stated in this particular enactment.

The Federal Act clearly does not purport to regulate the entire field of labor relations. Its terms regulate only a very limited portion of that subject. Section 1 of the Act declares it to be the policy of the United States to eliminate the causes of "certain substantial obstructions" to commerce and to mitigate and eliminate those obstructions in the following way: (1) By encouraging collective bargaining; and (2) by protecting the exercise by workers of full freedom of self-organization and designation of representatives of their own choosing.

In furtherance of this policy, the Act, by Section 7, declares the previously existing right of employees to self-organize and to bargain collectively. By Section 8, it declares certain acts by an employer, interfering with these rights, to be unfair labor practices. By Section 10, it provides a remedy for their prevention. By Section 9, it establishes the majority rule for the designation and selection of exclusive representatives for collective bargaining. The other sections of the Act are merely supplementary to the points above specified.

It is at once obvious that the Act makes no pretense of regulating the many phases of labor relations which, over a period of many years, have been subject to many forms of State regulation.

As pointed out by this Court in *Amalgamated Utility Workers vs. Consolidated Edison Co.*, 309 U.S. 261, 60 S. Ct. 561, 84 L. Ed. 493, the National Act did not create the rights of employees to self-organize or to bargain collectively declared in Section 7. Those are

fundamental rights which existed prior to the enactment of the National Act.

That the scope of the National Act is limited appears not only from the Act itself, but from the Reports of Congressional Committees. In the House Committee Report dated June 10, 1935, Report No. 1147, it is stated (emphasis throughout is ours):

" * * * The Committee wishes to emphasize particularly the objective of the bill to remove *certain* important sources of industrial unrest engendered, first, by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining, and second, by failure to adjust wages, hours, and working conditions traceable to the absence of processes fundamental to the friendly adjustment of such disputes

* * * By protecting the right of employees to organize and bargain collectively, and as a direct result by promoting just and appropriate practices for friendly adjustment, the bill eliminates many of the most important causes of unrest and strife. * * *

The Senate Committee Report dated May 2, 1935, Report No. 573, says, with respect to Sections 7 and 8 of the Act:

"These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the Committee wishes to emphasize two points. *In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8.* This is made clear by paragraph 8 of Section 2, which provides that 'The term "unfair labor practice" means any unfair labor practice listed in Section 8,' and by Section 10(a) empowering the Board to prevent any unfair labor practice 'listed in Section 8.' *Unlike the Federal*

Trade Commission Act, which deals somewhat analogously with unfair trade practices, *this bill is specific in its terms*. Neither the National Labor Relations Board nor the Courts are given any blanket authority to prohibit whatever practices that in their judgment are deemed to be unfair."

The limited scope of the Act further appears from that portion of the House Committee Report dated June 10, 1935, Report No. 1147, with respect to the objection that the Act was unfair because it was limited to employer unfair labor practices. In this connection, the Report states:

"Objection is constantly made that the bill is limited to unfair labor practices by employers. It is contended that the bill should prohibit 'any one,' including, of course, an employe or labor organization, from interfering with, restraining or coercing employes in the exercise of these rights * * *. But it is clear that corresponding to the right of employes to be free from interference, etc., by their employer in their organization activities, is the right of the other party to the negotiations, the employer, to be free in his designation of representatives for that purpose. * * * Such a reciprocal provision, forbidding employes to interfere with the right of employers to choose their representatives for collective bargaining would be a merely formal requirement, ignoring the realities of the situation. *In the light of common knowledge, it can hardly be said that this right of employers needs protection under this bill.* Organizations of employers in trade associations and in national organizations of such trade associations, have blanketed the country. * * *"

We think it is clear from the foregoing that the *sole* purpose of Congress was to attempt as a regulation of interstate commerce, to cure a *portion* of the evils caused by strikes by declaring and providing a remedy for *specific* unfair labor practices as an *aid* to employes in exercising their previously existing rights to self-organize and to engage in collective bargaining when so organized.

Such a narrow and well-defined purpose does not support the inference of an intent to exclude the States from this field of legislation, especially under the circumstances existing when the Act was passed.

The National Act Does Not Regulate Strikes

Section 13 of the National Act provides:

"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

The House Committee Report above quoted (Report No. 1147) states that the Bill deals with the failure to adjust disputes traceable to the absence of processes fundamental to the "friendly adjustment of such disputes."

The specific unfair labor practices which Congress deemed it necessary to define and forbid in order to accomplish its limited purpose, relate only to the conduct of an employer. The Act, in no way, therefore, regulates strikes or the conduct of employes in strikes, which, of course, are not the "friendly adjustment" of labor disputes referred to by the House Committee.

This Section of the National Act shows expressly that Congress did not itself intend to regulate strikes.

It intentionally left the States free to regulate such conduct, so long as, in so doing, they do not actually burden or obstruct interstate commerce.

The House Committee Report, No. 1147, before referred to, quoted with approval from the Report on S-1958 by the Senate Committee on Education and Labor, in part, as follows:

" * * * The bill is not a mere police-court measure. The remedies against such acts (referring to fraud or violence by employees or labor unions) in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris LaGuardia Act does not deny to employers relief in the Federal courts against fraud, violence, or threats of violence. * * *

"In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. * * * "

In testifying before the Senate Committee, Senator Wagner (the father of this Bill) said:

"It has been claimed that in order to be fair, the bill should prohibit employees and labor organizations, as well as employers, from coercing employees in their choice of representatives. This argument rests upon a misconception of the needs which give rise to this measure. Violence and intimidation by either employers or workers are adequately prevented by the common law and do not require special treatment. This measure deals with the subtler forms of economic pressure. Such pressure cannot be exerted by employees upon one another to an extent justifying congressional action." (Emphasis ours.)

Thus, Senator Wagner argued that State laws are adequate to prevent violence and intimidation by employees, and that the pressure of wrongful acts by employees does not occur to an extent "justifying congressional action." His whole thought was that such wrongful acts can be handled by State laws, and therefore, Federal legislation is neither necessary nor justified.

The above quotations from the Congressional Committee reports and the act itself show that in enacting the National Act Congress reasoned as follows:

1. Employees and employers alike have the free right to organize.
2. Employers have been successful in organizing as shown by trade associations which "have blanketed the country." Since employers have been so successful in exercising their right to organize, that right does not need "protection under this bill," and a reciprocal provision forbidding employees to interfere with this right of employers would ignore "the realities of the situation."
3. The employees have not been as successful in exercising their right of self-organization.
4. Therefore, as a regulation of Interstate Commerce, this Statute should be passed, giving them protection against specific employer unfair labor practices so they may more effectively exercise their right to organize and effectively bargain collectively.
5. To promote the "friendly adjustment of such disputes" we will encourage collective bargaining by making the refusal of an employer to bargain collectively.

with representatives of the majority an unfair labor practice (Section 8 (5)).

It is apparent that Congress sought to accomplish two specific things:

(1) To equalize the self-organization rights of employers and employees by giving employees the opportunity to exercise their right as effectively as employers had been exercising theirs; and

(2) To require employers to engage in collective bargaining with representatives of a majority.

Clearly, there is nothing in the foregoing indicating an intention of Congress to forbid the States from seeking other objectives not in conflict with the foregoing, which the States deemed necessary for the welfare, peace, and good order of its citizens.

In enacting the Wisconsin Act, and particularly the subsections here under consideration, the Wisconsin legislature had the foregoing purposes in mind and something additional. It recognized, as an exercise of its police power, that in the interests of the public, the employee, and the employer it was necessary to regulate something more than merely this right to self-organize and to collectively bargain. It recognized that *peace and good order were desirable even in strike situations*. It therefore created this civil remedy to prevent acts, each of which is generally recognized as unlawful and improper per se.

The civil remedy was created to protect not merely the right of self-organization and of collective bargaining, but also the other matters of public policy declared by the act, namely the interrelated interests of the

public, the employee and the employer in industrial peace, in regular and adequate income for employees, and in the uninterrupted production of goods and services. (See declaration of policy in Wisconsin Act, Sec. 111:01 —Appendix in Appellant's brief, page 55.)

This objective of the Wisconsin Act goes into a field in no way contemplated or considered by the National Act. Congress did not consider these objectives, but certainly Congress did not deliberately or consciously reject such legislation as improper. Certainly no reasonable man can argue that reasonable doubt does not exist as to the correctness of this contention, and in cases of reasonable doubt the court will not declare a Statute unconstitutional.

None of the unlawful acts enjoined by the subsections here under consideration or the order here involved has anything to do with the subject of interference with the right to self-organize or to bargain of either the employees or the employer.

It is clear that the portions of the law complained of are on a subject wholly outside of the field of the National Act.

The same contention here made by appellants was presented to and overruled by the Wisconsin Supreme Court in *Wisconsin Labor Relations Board vs. Fred Rueping Leather Co.*, (1938), 228 Wis. 473, 279 N.W. 673, supra. That case involved the validity of the Wisconsin Labor Relations Act passed in 1937. It was a substantial counterpart of the National Act and was known as the Wisconsin "Little Wagner Act." The Act was held to be

valid in a scholarly opinion by Mr. Justice Wickhem. The Court said:

"The state may, therefore, regulate labor relations in the interests of the peace, health, and order of the state, and the federal government may regulate this relationship to the extent that unregulated it tends to obstruct or burden interstate commerce. Obviously, a possibility of conflict between these powers exists only as to the portion of the field with which congress has competency to deal. In the absence of a federal statute either dealing with or pre-empting this field, the police power of the state has full operation, provided no undue or discriminatory burdens are put upon interstate commerce." (p. 480)

As in this case, it was contended that Section 10(a) of the National Act, which provides that the power of the Board to prevent unfair labor practices shall be exclusive and shall not be affected by any other means of adjustment or prevention, showed an intention to pre-empt the field.

The Wisconsin Court in the Rueping case analyzed this section of the Act in the light of the other portions of the Act and held that it did not deal with the scope of the Act, but dealt merely with the powers and jurisdiction of the National Board in its administration of the Act, for the purpose of establishing its exclusive character, as contrasted with the numerous other Federal Boards and agencies then in existence, and which might otherwise be thought to have concurrent jurisdiction.

The Court also pointed out that several of the Wisconsin Statutes as to labor relations had been given force and effect by this Court, particularly Sections of the Wisconsin Labor Code in *Senn vs. Tile Layers' Protective Union*, 301 U.S. 468, 57 Sup. Ct. 857, 81 L. Ed. 1229,

and in *Lauf vs. E. G. Shinnors & Co.*, 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 516.

Although the point here involved was not raised in this Court in the two cases last cited, the decisions of this Court enforcing the Wisconsin laws were recognized by the Wisconsin Court to support the conclusion that in enacting the National Act "Congress was entering a new and uncharted field, one in which the boundaries of any competency it might have were extremely doubtful."

The Court cited the opinion of Mr. Chief Justice Hughes in *Santa Cruz Fruit Packing Co. vs. N. L. R. B.*, 303 U.S. 453, 38 S. Ct. 656, to the effect that by suggesting doubtful and extreme cases, one might propose a startling broadening of the concept of interstate commerce that would virtually destroy the police power of the States; that the case holds the power of Congress under the commerce clause must be consistent with the maintenance of the Federal system; that formulas are not provided by the great concepts of the Constitution, and that "In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion." (p. 466)

The Wisconsin Court then concluded as follows:

"It seems to us a violent assumption that in dealing with a subject in which the limitations on its power were and are so uncertain as to require determination by such a process congress could have intended to exclude state legislation in the field, except so far as it conflicted with the federal act. * * *

The fact that under the National Labor Relations Act the board initiates all proceedings to administer or to enforce the act should also be considered in this connection. It cannot have been supposed that

the cases deemed by the board so importantly to affect interstate commerce as to warrant intervention or with which the board had time to deal would include all of the cases which the states might need to deal with in the interests of local peace and good order. It cannot have been intended to 'paralyze the efforts of a state to protect her people against impending calamity' and commit the matter to the exclusive discretion of a distant and overworked federal agency. * * * " (p. 491)

Appellants' contention of pre-emption was definitely repudiated by this Court in the recent decision in *Milk Wagon Drivers' Union, Local 753 vs. Meadowmoor Dairies, Inc.*, 312 U.S. 287, wherein Mr. Justice Frankfurter stated, at page 295:

" * * * To deny to a state the right to a judgment which the National Labor Relations Board has been allowed to make in cognate situations, would indeed be distorting the Fourteenth Amendment with restrictions upon state power which it is not our business to impose. A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."

Since a State may protect its citizens against violence and unfair labor practices by injunction, it seems clear that it may likewise protect them by the remedy created by the Wisconsin Act.

We submit that it is not definitely or clearly established that Congress intended to exclude the State from this exercise of their police power, or that in this case

there is repugnance and conflict between the two Acts of such a direct and positive nature that they cannot be reconciled or consistently stand together.

II.

The Issues in this Case Present no Conflicts Between the Two Acts.

(a) This case could not arise under the National Act.

This case could not have been brought under the National Act which relates only to unfair labor practices of *employers*. As demonstrated before, the Act provides a remedy only for certain specified acts, namely, "any unfair labor practice (listed in Section 8) affecting commerce." Section 10(a) of the National Act.

Section 8 specifies certain unfair labor practices by "an employer."

It is obvious that a strike in a plant engaged in interstate commerce might directly affect such commerce. Had it elected to do so, Congress, of course, had the power to enact provisions similar to the subsections of the Wisconsin Act here involved. Appellants argue that Congress' election not to do so establishes its intent to prevent the States from so doing. We think it has been demonstrated above that such failure by Congress is clear evidence of its desire to keep its legislation within narrow limits.

Appellants' argument was well characterized by the Wisconsin Supreme Court in the following language:

"The appellants, while asserting that they do not do so, in fact argue this case as if the failure of Congress to define unfair labor practices of employees

operates as a license to employes in the enforcement of their demands to do any or all of the things declared by the Employment Peace Act to be unfair labor practices. (R. 49)

In this connection, we again call the Court's attention to the case of *Savage vs. Jones*, 225 U.S. 501, 533, *supra*, where this Court held that the intent to supersede the State police power "as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field." (p. 533)

(b) Various sections of the Wisconsin Act discussed by appellants.

In Subdivision II of Appellants' Brief, counsel discuss five separate provisions of the Wisconsin Act which they claim to be in conflict with the National Act. These relate to:

(1) Section 111.01, declaring the State public policy (Appellants' Brief, p. 31).

(2) A difference between the two Acts in the definition of labor disputes (p. 33).

(3) An alleged conflict as to bargaining rights of minorities (p. 35).

(4) An alleged conflict as to the determination of an appropriate bargaining unit (p. 35).

(5) An alleged conflict over unfair labor practices of employes and Unions (p. 37).

The first four items are sections of the Wisconsin Act not involved in this case. They present merely the possibility of conflict in cases which appellants' counsel think may arise in the future.

(c) The Court will decide only the constitutional issue presented by this case.

When the *Rueping* case, involving the 1937 Wisconsin Act, was before the Wisconsin Supreme Court, similar arguments were presented, and they were disposed of by the Court in that case in the following language:

"With the possibility of conflict in the administration of the state and national labor relations acts, we find no occasion to deal further than to state what is obvious: That in case there is conflict in a matter properly within the scope of the national act, the state must yield. *See Mintz v. Baldwin*, supra. We see no reason to anticipate and determine when and under what circumstances the state board is ousted of jurisdiction. That question is not here under the facts of this case, and the possibilities of conflict may never materialize. When they do, it will be time enough to attack the problems they present." (*W. L. R. B. v. Rueping*, 228 Wis. 473, 492)

This, of course, is in line with the well established principle that this court will pass upon the constitutionality of a law only when necessary to the determination of the merits of the cause under consideration. The practice of this court has been aptly stated as follows:

" * * * that it rigidly adheres to the rule *never to anticipate* a question of constitutional law, in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required *by the precise facts to which it is to be applied*, and never to consider the constitutionality of state legislation *unless it is imperatively required*." 11 American Jurisprudence on Constitutional Law, page 722. (Emphasis ours)

See *San Bernardino County v. Southern P. R. Co.*, 118 U.S. 417, 6 Sup. Ct. 1144,

Tennessee Publishing Co. v. American National Bank, 299 U.S. 18, 57 Sup. Ct. 85,

Arizona vs. California, 283 U.S. 423, 51 Sup. Ct. 522.

In dealing with constitutional questions this court will not go beyond the limits of what is required by the exigencies of the case in hand.

Hauenstein v. Lymham, 100 U.S. 483, 25 L. Ed. 628.

Courts will meet questions as to the validity of legislation as they are raised, but will not anticipate them.

Boyd v. Alabama, 94 U.S. 645, 24 L. Ed. 302,

Euclid vs. Ambler Realty Co., 272 U.S. 365, 47 Sup. Ct. 114.

In construing state laws and in the absence of an actual decision of the state courts, the Federal Supreme Court will not assume that the law will be so broadly construed as to bring it in conflict with the Federal constitution.

Mountain Timber Co. v. Washington, 243 U.S. 219, 37 Sup. Ct. 260.

Until construed to the contrary by the state courts, the Federal Court will construe it in such a way as to leave it valid if that construction can reasonably be made.

Wadley S. R. Co. vs. Georgia, 235 U.S. 651, 35 S. Ct. 214.

Under this doctrine, it is clear that unless a party is directly and adversely affected by the portion of an Act challenged as unconstitutional, the challenge will not be passed upon by this Court.

(d) Alleged conflict of unfair labor practices of employee and unions.

The alleged conflict arising from subsections (a) and (f) of Section 111.06(2) and (3) of the Wisconsin Act defining employee and Union unfair labor practices, and the alleged conflict in the definition of the term "employee" (Section 111.02(3)), which appellants' counsel discuss in connection therewith (Appellants' Brief, pp. 37-45), are the only alleged conflicts within the issues of this case.

In arguing this point, as well as other points, appellants' counsel fail to accept as conclusive the Wisconsin Supreme Court's construction of the Wisconsin Act.

It is clear, of course, that the decision of the Wisconsin Supreme Court construing the Wisconsin Act is conclusive in this Court.

Senn vs. Tile Layers' Union, 301 U.S. 468, 477;

Minnesota vs. Probate Court, 309 U.S. 270, 273.

Appellants' counsel argue that as to the 14 individual appellants, the Act terminates their employee status by a mere Board finding that they have committed unfair labor practices. The Wisconsin Supreme Court has held that the finding has no such effect. As bearing generally upon this subject, appellants' counsel make other misstatements respecting the decision of the Wisconsin Supreme Court in this case. At page 24 of Appellants' Brief, they state, with respect to the individual appellants that "The State Board has branded them as outlaws under a State Labor Relations Act and subjected them to the forfeiture of their collective bargaining rights." At page 34, they say that under the State Act, the rights of the employees to be protected from employer unfair

labor practices and to vote as employees for the bargaining unit "are terminated."

These statements are directly contrary to the decision of the Wisconsin Supreme Court which held "that the act affects the rights of parties to a controversy pending before the Board only in the manner and to the extent prescribed by the order." (R. 51) It is undisputed that the Order in this case contained no such provisions.

Appellants' counsel are, of course, correct in saying that under Section 111.07(4) of the Wisconsin Act, the Board has power, in its discretion, to suspend for one year "rights, immunities, privileges, or remedies *granted or afforded by this Chapter.*" The Order and Judgment in this case does not suspend any such rights or remedies. But, counsel argue that a conflict arises because of the *possibility* that in some future case the Board will, in its discretion, exercise that power.

It is in this connection, that counsel refer to the difference in the definition of the term "employee" in the two Acts. This difference, however, fades from significance in view of the construction placed upon it by the Wisconsin Supreme Court, first, that a mere finding by the Board that the employee has committed an unfair labor practice does not terminate his employee status, and second, that such definitions in each of the Acts "apply only for the purposes of the Act in which they are found." (R. 52) Clearly, the Wisconsin definition of the term has application only in the administration of that Act and has no bearing whatever upon the administration of the National Act.

The rights and remedies which the Board may suspend under this Section of the Statute are only those "granted

or afforded by this Chapter." The Wisconsin Supreme Court expressly recognized that the employe status is such a right or privilege when it said, in discussing this Section of the Act: "The continuation of the status of an employe is certainly a right or privilege. The Act specifically provides how it shall be terminated, that is, by Order of the Board. (R. 51)

It is immediately apparent that the suspension by the State Board of any rights or remedies afforded by the State Act can have no effect upon the administration of the National Act by the National Board. In administering that Act, the National Board will necessarily be controlled by its own provisions and by the National Act's definition of "employe." Any one who comes within that definition will be treated as an employe by the National Board irrespective of any State action to the contrary. This was expressly recognized by the Wisconsin Court when it held that "When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any State authority to the contrary notwithstanding." (R. 48)

Appellants' counsel argue that since the Board has the power to suspend rights or remedies granted by the Wisconsin Act, this causes a direct conflict with the National Act on the ground, as stated by appellants' counsel, that the termination of an employe status and of the employe's right to vote for bargaining representatives and of the Union to act as such representative "uses the loss of collective bargaining rights as a penalty for the violation of local police laws," (Appellants' Brief, p. 38)

Counsel overlook, however, that the rights and remedies which may be suspended are only those granted or afforded by the Wisconsin Act, which suspension necessarily can have no effect upon the National Act.

We think counsel fall into one other fundamental error in this respect. They seem to assume that under the National Act, the right of a striking employe to remain such an employe, with its corresponding right to have collective bargaining for him and to vote for bargaining representatives as such an employe, is an absolute one which can neither be reasonably regulated nor terminated. Appellants argue that this section of the Act shows a general State policy to discourage collective bargaining in conflict with the national policy to encourage it.

The Wisconsin Statutes above quoted which specifically declare the State policy in favor of collective bargaining are a sufficient answer to that contention, and we think that the decision of this Court in *N. L. R. B. vs. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S. Ct. 490, effectively disposes of the contention that the right of a striking employe to remain such is an absolute one.

That case held that rights of employes under the National Act were lost when they engaged in the unlawful conduct which occurred there. The test of whether such conduct is unlawful, of course, is based upon State and not Federal law. When the sit-down strikers in the *Fansteel* case invaded the Company's property, they were violating State laws, and it was such violation which caused the loss of their status as employes and of their rights under the National Act. It is clearly incorrect to say that every State law which may result in a loss of employe status and the accompanying bargaining rights is in violation of national public policy.

The decisions of the Federal Courts cited by appellants (*Stackpole Carbon Co.* case, *Carlyle Lumber Co.* case, *Republic Steel Co.* case, *Remington Rand, Inc.*, case, Appellants' Brief, pp. 41-43) are clearly distinguishable: In each of those cases, the principle enforced was that where an employer is guilty of unfair labor practices, and where the Board decides that in order to effectuate the purposes of the Act it is proper to require certain striking employees to be reinstated, the Board, in its discretion, may order the reinstatement of employees even though they have engaged in minor disorders common to labor disputes, such as a fist fight upon the picket line.

It was pointed out in the *Fansteel* case that "the fundamental policy of the Act is to safeguard the rights of the self-organization and collective bargaining" and not a right to engage in lawlessness. (306 U.S. 257)

We submit that a Statute which provides that an employee may lose his status as such because he commits acts of violence, intimidation, and other disorders, in no way interferes with the rights of self-organization or of collective bargaining. Certainly, it does not interfere any more than a Statute making such act a crime for which he could be put in jail, which certainly would effectively interfere with his employee status.

Appellants' counsel overreach themselves when they say (at p. 45) that the policy of the State Act is "to require the forfeiture of collective bargaining rights," and that it "requires, as a penalty, employees who have violated local police laws to forego collective bargaining privileges and rights." (Emphasis ours.)

The decision in this case shows that the Act does not require any such thing.

At pages 46 and 47, counsel discuss what they believe was the theory of the Wisconsin Board as to the effect of a finding that an employe committed an unfair labor practice. The Wisconsin Board is composed of one lawyer and two laymen. Whatever that theory may have been, the effect of such a finding, or rather its lack of effect, is established by the decision of the Wisconsin Supreme Court in this case.

Appellants' counsel concede that the State of Wisconsin may legislate "upon the incidents of the employment relation as they relate to peace, morals, health, good order and general welfare." They concede that the State may punish "by proper civil or criminal measures, breaches of peace, disorder or acts of force or violence," and that the State "can send strikers to jail for disorderly conduct, unlawful assembly or riot." (Appellants' Brief, p. 20)

As stated by the Wisconsin Supreme Court, this is a concession that the State has power "to deal with some aspects of every labor dispute." (R. 53) In view of these concessions, it is difficult to understand counsels' contention that an order which merely requires appellants to cease and desist from violence, intimidation, etc., "has branded them as outlaws," or how such an order unlawfully interferes with the right of self-organization or to collectively bargain.

It is likewise difficult to see how such an order discourages collective bargaining or is an obstacle to the effectuation of the policies of the Federal Act. If it does, then the decision of this Court in the *Fansteel* case permitting the discharge of employes for violence would have a similar effect.

(e) Alleged conflict in declaration of public policy.

We think it clearly appears from the foregoing that such alleged conflict is fanciful. The public policy of Wisconsin as declared in the Act in question and in other statutes cited certainly declares the policy of promoting self-organization and collective bargaining.

In this connection appellants' counsel make a misstatement on page 31 of their brief where they say that "activities of workers to induce fellow workers to join a union and bargain collectively" under the statute are made "equally wrongful as is the coercion exercised by an employer * * *." Citing Section 111.06(2) (a) of the Wisconsin Act. This section appears at page 65 of the Appendix to appellants' brief.

The order in question was made under subsections (a) and (f) of that section. They make the following acts unfair labor practices: coercion and intimidation, injury to person or property, and prevention of work or employment by mass picketing, intimidation, force, or coercion; also the obstruction and interference with entrance to places of employment or the free use of the streets. It can hardly be said that this forbids activities of workmen "to induce" fellow workers to join a Union and bargain collectively.

(f) The alleged conflict as to definition of labor dispute.

In discussing this matter and referring to the rights of strikers to be protected from employer unfair labor practices, and to retain their employe status to vote for a bargaining agency, appellants' counsel say: "Under the State Act, these rights are terminated." (P. 34) This is a misstatement. The Board, in a proper case, has power to suspend rights granted by the Act, but the Act itself does not terminate such rights.

(g) Alleged conflict as to rights of minority to bargain collectively.

Appellants' counsel state that under Section 111.06(1) (e), an employer is guilty of an unfair labor practice if he bargains with representatives of a minority even though there is then no rival Union representing the majority. (Appellants' brief, p. 35)

This Section of the Wisconsin Act has never been construed by the Wisconsin Supreme Court. It is our opinion that counsel incorrectly construes this Section. When finally construed, in line with this and other Statutes declaring the State policy in favor of collective bargaining, we submit the Court will hold this Section to mean that an employer is guilty of unfair labor practice if he bargains collectively (as that term is defined in the Wisconsin Act, Sec. 111.02(5)), with representatives of a minority only when a Union represents the majority and he then has the duty to bargain with that majority. Such duty exists also under the National Act. (Section 8(5)).

As to all of the foregoing alleged conflicts, as well as the alleged conflict as to determination of the bargaining unit, it is clear that all of these provisions affect only the administration of the Wisconsin Act by the Wisconsin Board, as expressly held by the Wisconsin Supreme Court. Whenever the National Board takes jurisdiction and seeks to apply the National Act, all of the definitions and provisions of the Wisconsin Act and the application thereof by the Wisconsin Board, must give way to the superior force and effect of the National Act and of any order which the National Board makes under it.

(h) Separability clause.

Appellants' counsel argue at page 49 that the Act is unconstitutional as a whole and that its provisions are not separable. This is clearly erroneous. Certainly there is nothing in this case which makes it impossible to sustain the order here made and the subsections of the statute on which it is based, forbidding violence, intimidation, etc., and which do not in any way terminate appellants' employee status or their collective bargaining rights, even though in some later cases when the issue is properly presented to this court some other sections of the act, or parts thereof, may be found invalid.

Appellants' quotation from *Employers' Liability Cases*, 207 U. S. 463, 501, 28 S. Ct. 141, as follows, makes this clear.

"Equally clear it is, generally speaking, that where a Statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal."

The Wisconsin Act contains a separability clause. (Section 111.18, Appendix in Appellants' Brief, p. 80).

(i) Appellants' entire brief is predicated upon a false premise.

That premise is that an order which forbids violence and intimidation on the part of strikers unlawfully interferes with self-organization and with collective bargaining. Counsel erroneously say that such an order destroys "the practices and procedures of collective bargaining in labor relations affecting interstate commerce protected by Federal law." (Appellants' Brief, p. 53)

CONCLUSION

Nothing in the subsections of the statutory provisions in issue or the Order made under them, in any way interferes with, conflicts, or affects the objects of the National Act which was passed to protect, namely, the rights of self-organization and the rights of collective bargaining.

In view of the foregoing the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED
ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA, ET AL.

Appellants,

WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY,

Respondents.

**Reply Brief of
Wisconsin Employment Relations Board**

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THE JURISDICTION OF THE COURT

The Solicitor General in the brief amicus subtly suggests:

"The question of supersedure may arise in one of two postures, depending upon the decision of the Court as to the scope of the issues before it. Appellees contend that, for purposes of the present case, the Wisconsin statute must be read as though it contained only provisions authorizing the State Board to enter

orders of the specific type now before the Court; appellants contend, on the other hand, that the Wisconsin Act may not be read in such disjunctive fashion and that the question before the Court is whether the Wisconsin Act is invalid in its entirety (Br. 49-51).

“ * * *

“If, as appellees contend, the Wisconsin statute must be read for purposes of the present case as though it contained only provisions authorizing the State Board to enter orders of the specific type now before this Court—in other words, if the case is to be considered as though those provisions constituted a separate statute and as though the remainder of the Wisconsin Peace Employment Act were not in existence—we believe that no conflict with the National Labor Relations Act does exist.”

This Court does not sit as an appellate Court to review decisions of state courts, under sec. 237 (a) of the Judiciary Act as to whether statutes may be read in the “disjunctive fashion” or as to whether certain provisions of an Act constitute a separate statute as though the remainder of the provisions of the Act do not exist. The Court reviews the decisions of state courts to protect against invasion of federal rights. Constitutional questions can be raised only by litigants who have had a constitutional right of their own invaded. The Court does not first determine the constitutionality of a statute and then determine whether the statute as construed violates some constitutional right of a litigant. It requires the litigant to show that the statute, as applied to him in a particular case under consideration, has invaded a constitutional right of his entitled to protection.

"One who would strike down a statute must show not only that he is affected by it, but that as applied to him it exceeds the power of the State. This rule, acted upon as early as *Austin v. Boston*, 7 Wall. 694, 19 L. ed. 164, and definitely stated in *Albany County v. Stanley*, 105 U. S. 305, 314, 26 L. ed. 1044, 1051, has been consistently followed since that time. Compare *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 S. Ct. 784; *Darnell v. Indiana*, 226 U. S. 390, 398, 57 L. ed. 267, 272, 33 S. Ct. 120; *Roberts & S. Co. v. Emmerson*, 271 U. S. 50, 54, 55, 70 L. ed. 827, 833, 834, 46 S. Ct. 375; 45 A.L.R. 1495; *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso.* 276 U. S. 71, 88, 72 L. ed. 473, 479, 48 S. Ct. 291. For the reasons to be stated, the discrimination complained of, and held arbitrary by the court is, in my opinion, valid as applied to corporations."

(Per Justice Brandeis in *Liggett Co. v. Lee*, 288 U. S. 517, 77 L. ed. 929, 942.)

Thus, in *Austin v. The Aldermen*, 74 U. S. 694, 698, the Court said:

"The only question of Federal jurisdiction, and of which this court can take cognizance is, whether the plaintiff in error has been deprived of any right, contrary to the act of Congress, upon which he relies for protection.

"The facts bring the case within the terms of the act, according to the strictest construction which can be given to them. This is conclusive of the case. Whether, in another case, arising upon a different state of facts, the statute may not produce results in conflict with the act of Congress, and which this court will therefore be bound to revise and correct, is an inquiry upon which we are not called to enter. * * *

Nor does it help the case to urge, as appellants urge, that as their employer in a proper case would be subject to the jurisdiction of the National Act they belong to the class entitled to the protection of the National Act and are therefore entitled to raise the questions sought to be raised. The answer to any such argument is that until such proper case is presented they do not belong to a class entitled to protection of the National Act. Unless the case involves an employer unfair labor practice (which this case does not) the appellants do not belong to a class with respect to which the National Act affords any protection, at least until a law has been applied to them in a particular case so as to deny to them rights which the National Act protects.

See: *Supervisors v. Stanley*, 105 U. S. 305; *Lampasas v. Bell*, 180 U. S. 276; *Tyler v. Judges of Court of Registration*, 179 U. S. 405; *Turpin v. Lemon*, 187 U. S. 51; *The Winnebago*, 205 U. S. 354; *Cronin v. Adams*, 192 U. S. 108; *Darnell v. Indiana*, 226 U. S. 390; *Hatch v. Reardon*, 204 U. S. 152; *Standard Stock Food Co. v. Wright*, 225 U. S. 540.

In *Hampton v. St. L., Iron Mt. & S. Ry.*, 227 U. S. 456, the railroad involved was engaged in interstate commerce and obviously belonged to the class, in a broad sense, entitled to both protection of the Act of Congress involved and to the Constitution itself. But the railroad attempted to raise constitutional issues without showing wherein the Act, as applied to it, had violated any constitutional right that it possessed. It was accordingly denied relief by this Court. A party does not belong to a class entitled to constitutional protection until it has been shown that the law, as applied in a particular case under consideration, has in-

vaded some right of the party entitled to constitutional protection. If the law were otherwise this Court would be continually passing upon hypothetical and academic questions just as it is requested to do in the instant case. This case illustrates in an extreme degree the necessity for the rule. The Board is literally required to retry, by way of argument and investigation, numerous cases that it has handled. Conflicts in administration are attempted to be shown by reference to wholly inadequate factual presentations of the cases; by hearsay piled upon hearsay and at least as to cases cited in the Appendix to the Solicitor General's brief, by a positive misstatement as to the actual facts of the cases referred to.

It speaks well for the administration of this Act by the State Board that neither the National Board nor its Regional Director in the region in which Wisconsin is located, has been able to point to more than four cases in nearly three years' administration of the Act where they can even make any plausible claim that the Act operates as an obstacle to the full effectuation of the federal policy. When the facts in relation to those cases are accurately and more fully stated it will be seen that the Act in its operation and administration does not present any conceivable obstacle to the full effectuation of the federal policy.

The Board had to write its Regional Director to determine whether the Act could conceivably act as an obstacle to the effectuation of the federal policy. Upon the basis of an inaccurate report, submitted by the Regional Director, it is stated in the Appendix:

"* * * It is the considered conclusion of the National Board that the provisions and objectives of the Wisconsin Employment Peace Act (hereafter called

the State Act) in so far as they depart from or conflict with those of the National Labor Relations Act (hereafter called the National Act) have in practice seriously interfered with and frustrated the declared policy of the United States set forth in the National Act—* * *

As the report is inaccurate, the "considered conclusion" amounts to nothing, and yet, an Act which represents the legislative policy of a sovereign state is sought to be set aside by such conclusion and by trying every case except the instant case, which does not involve the invasion of a single constitutional right of any of the appellants.

The Appendix to the Solicitor General's brief states:

"On the other hand, there has been no conflict or difficulty in various other States which have enacted State Labor Relations Acts whose provisions and objectives are in harmony with those of the National Act, and whose state boards have evidenced a cooperative attitude in administering the state Acts. * * *

The Solicitor makes the most of this in his brief. The Board is not accused of lack of cooperation although the language employed is intended to carry that inference. The fact that the National Board points to but four instances in nearly three years' administration of the Act (instances which have been magnified and do not present the true situation) speaks louder than words as to the extent of cooperation that the State Board has given the National Board.

The Board does not point to a single situation where it has requested cooperation and that cooperation has been refused. The National Board will continue to have the cooperation that it has always had as manifested by its

own letter to the Board under date of December 29, 1939, copy of which is attached to this brief as Appendix A.

The appellants' lack of standing to raise the question of unconstitutionality of the Wisconsin law in the case at bar may be easily analyzed by reference to *Cloverleaf Butter Co. v. Haywood Patterson as Commissioner of Agricultural Industries of the State of Alabama* (decided by this Court on Feb. 2, 1942). Would the Cloverleaf Butter Company have had any standing to challenge the Alabama law without showing seizure by the Commissioner of Agriculture of its own "packing stock butter"? Could it succeed upon a record which did not even show that somebody else's butter stock had been seized,—by references in briefs attempting to show that the law, as applied to someone else, may have violated that someone else's constitutional rights? Would the Cloverleaf Butter Company even have standing in this Court to challenge the Alabama statute if it had built a record showing that someone else's butter stock other than its own had been seized? Could the Butter Company have succeeded by championing the constitutional rights of others and without showing any invasion of its own constitutional rights?

We have searched diligently for any authority which would support the appellants' right to challenge in the instant case. We have not found any authority, nor have the appellants cited any which supports that right.

ANALYSIS OF THE SOLICITOR'S ARGUMENT WITH RESPECT TO CONFLICTS BETWEEN THE STATE AND NATIONAL ACTS.

We shall cover only such observations as are made by the Solicitor and which have not been made by the appellants and thus already answered.

The Solicitor does not claim that the field of labor relations is preempted by the National Labor Relations Act. Indeed, any such claim would be entirely inconsistent with the National Board's administrative interpretation of the Act. Thus in the Board's Second Annual Report, p. 2, for the year ending June 30, 1937, the Board states:

"A completely new and important development during the past year was the passage by a number of State legislatures of State labor relations acts, modeled in large measure after the National Labor Relations Act. Such legislation was passed in Massachusetts, New York, Pennsylvania, Utah, and Wisconsin, and by June 30, 1937, labor relations boards were in the process of formation in several of these States. This trend of applying the principles embodied in the National Labor Relations Act to all industry, whether interstate or intrastate, is a healthful one, and will undoubtedly become more widespread. It is important that uniformity of legal principles and administrative policies be achieved, and the Board hopes to aid in achieving this result by means of conferences with the various State boards and by an interchange of information."

Again in the Third Annual Report of the Board for the year ending June 30, 1938, p. 3, the Board states:

"C. STATE LABOR RELATIONS BOARDS

"In its last report the Board stated that it looked with favor on the adoption of State labor relations acts patterned after the National Labor Relations Act. Consequently, the Board regrets that during the fiscal year covered by this report no other States saw fit to follow the example previously set by Massachusetts, New York, Pennsylvania, Utah, and Wisconsin by passing labor relations acts. Labor relations bills were, however, introduced in several legislatures.

"Last year the Board also reported that it hoped to make cooperative arrangements with the State boards to the end that administrative friction and lack of uniformity in the application of principles would not ensue. This hope has been completely fulfilled and the Board or its agents has been able to achieve satisfactory working arrangements with all of the State boards or their agents. As a result, cases filed with this Board in which State boards had jurisdiction were immediately and informally transferred to the State boards, or vice versa, with a minimum of misunderstanding and with no delay. Since many cases which would have previously been filed with this Board but over which this Board would nevertheless not have had jurisdiction were filed with State boards after they were organized, the unnecessary burden of investigation of such cases theretofore carried by the Board was lifted.

"Naturally, the Board hopes that when the State legislatures meet again they will give serious consideration to the question of bringing to workers engaged in intrastate business the benefits now enjoyed by workers in interstate commerce. The Board has not been jealous of its jurisdiction and is prepared to cooperate with any new State boards to the same extent as it has with the boards already created."

Thus, in analyzing the question of conflict between the two Acts, cases involving a preempted field are obviously inapposite.

The Solicitor states that it is "a departure from the Congressional policy to suggest, as the State Act does, in its references to 'interference' and 'coercion' by either party (See 111.01 (2), 111.06 (2)), that employers and employees stand upon an equal footing in this respect, that workers and unions have no more legitimate concern in the organization of employees than have the employers themselves. * * *

The State Act does not suggest that workers have no more interest in organization than do employers. Having in mind the legal concept of "interference" and "coercion", *Texas & New Orleans Railroad Co. et al., v. Brotherhood of Railway & Steamship Clerks et al.*, 281 U. S. 548, 568, 50 S. Ct. 427, 74 L. ed. 1034, does the Solicitor mean to suggest that it is the established policy of the National Act that workers shall have their will overcome by other workers and be *compelled* and *forced* to join unions? And if such is the policy of the National Act would the Solicitor contend that it is constitutional? Does the Solicitor mean to infer that by the passage of the National Act the states lack the power to prevent workers *compelling* and *forcing* other workers to join unions and to engage in collective bargaining activities?

We have already shown that the definition of a "labor dispute" (sec. 111.02 (8)) is of no significance in the administration of the Act. The Solicitor, in pointing out differences in definitions between the two Acts, states that the "State law excludes from the definition all controversies regarding wages, hours and working conditions,—the major

cause of labor strife." Is the Solicitor merely pointing out difference in language or is he contending that the definition in the state law is not sufficiently comprehensive in terminology to embrace "wages, hours and working conditions"? The language of the definition obviously is sufficiently comprehensive to embrace "wages, hours and working conditions". No one has ever had the temerity to argue otherwise.

The same observation applies with respect to the Solicitor's comment regarding collective bargaining, sec. 111.02 (5). The Solicitor emphasizes the use of the term "negotiating" in the definition and then comments that collective bargaining in sec. 8 (5) (not defined in the National Act) has been construed to extend beyond the act of negotiation and to include a written agreement when terms and conditions are actually agreed upon. Why the emphasis upon the term "the negotiating" and a complete ignoring of the rest of the definition of the term "in a mutually genuine effort to reach an agreement"? Does the Solicitor intend to imply that the State Act is not susceptible of the meaning that agreements, when arrived at, must be reduced to writing? Every argument that can be made in favor of the National Act requiring agreements, when arrived at, to be reduced to writing is equally applicable to the State Act requiring the same thing. Just what legitimate argument can be made that the State Act does not require agreements when arrived at to be reduced to writing?

The Solicitor feels that sec. 111.06 (1) (d), which provides that an employer is not guilty of refusing to bargain collectively in the event he demands an election, is subject to endless abuse by an employer anxious to avoid

meeting his employee representatives at the council table. The answer to that question is that this section does not permit any abuse by an employer. An employer is not obliged, under the National Act, to bargain collectively unless the union submits some form of proof to him that they represent a majority in an appropriate collective bargaining unit and are entitled to demand collective bargaining. If an employer refuses to bargain collectively where he has been furnished such proof and where there can be no reasonable doubt as to the union status, he could not successfully defend an employer unfair labor practice case by a mere plea that he is entitled to have an election held under sec. 111.06 (1) (d) before he bargains. To avail himself of the terms of this provision, an employer undoubtedly must show "good faith" and inability to determine the question as to whether the union occupies the status whereby it can insist upon the employer bargaining collectively with it. So construed (and that is the only proper construction of the section) there obviously is no conflict with the National Act.

The point is made that sec. 111.06 (1) (b) "permits the employer to 'cooperate' with representatives of a majority of his employees, at their request, by allowing 'employee organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company.' Under the National Act, in a proper cases, this is a form of forbidden employer support of a labor organization." The Solicitor cites *Nat'l. L. R. Bd. v. Bradford Dyeing Ass'n.*, 310 U. S. 318, in support of his argument. The answer to the argument is that this would be a form of forbidden support of a labor organization under the State Act in a proper case

and that those proper cases do not differ at all under the State Act and under the National Act. The question is one of fact under both Acts as to whether the organization is in fact company dominated. The organization found to be company dominated in the *Bradford Dyeing Ass'n.* case, above cited, would unquestionably be found to be company dominated under the State Act. Will cooperation with representatives of a majority of his employees, at their request, "by allowing employee organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company" alone and without more, establish a company dominated union under the National Act? The Solicitor does not claim that it will. We know of no case where the National Board has ever so held or where, if it has ever so held, it has been sustained by the courts in so holding.

It is urged that under sec. 111.05 (3) the State Board must list on the ballot the names of all organizations submitted by an employee or group of employees; that under the National Act the Board is most circumspect in placing on the ballot so-called "independent unions" which may, upon investigation, be company dominated. If the Solicitor means to infer from the above statement that the State Board is required to place upon a ballot for a collective bargaining representative, an independent union or for that matter a national union, which stands charged before the Board as being company dominated, the Solicitor is in obvious error. It is stated that "unsympathetic administration in this regard would make a mockery of the employees' rights." The only answer that need be made to that observation is that there has been no unsympathetic

administration. As is shown by the State Board's own statement, attached hereto as Appendix B, the Board knows of no case where it has ever certified an independent and where it has ever subsequently been set aside by the National Board as a company dominated union. This is a remarkable record as a few such instances *might* easily occur in the administration of any Act, including the National Board's administration of its own Act. When they do occur, they do not prove anything other than that one Board acted upon certain evidence and that another Board acted upon perhaps more complete evidence or that the same Board, after certification, subsequently acted upon more complete evidence.

The Solicitor comments upon sec. 111.06 (2) (e) of the State Act with respect to unauthorized strikes. The Solicitor refers to that provision in the National Act which states that nothing therein shall be construed to impede or interfere with or diminish in any way the right to strike. (sec. 13). Does the Solicitor mean to infer from this that the National Act confers the right to strike and that the states are without power to regulate strike activities engaged in by minorities? What function does sec. 13 serve in the National Act? The constitutional basis for the legislation is that of preventing burdens or obstructions to interstate commerce. Such being the constitutional basis for the National Act and the avowed purpose of the Act, without sec. 13 it might well have been argued that the Act restricted the right to strike. Sec. 16 is placed in the Act for the sole purpose of indicating Congressional intent that so far as the Act itself is concerned it shall not be construed as imposing limitations upon the right to strike. But that is a far cry from saying that the Act con-

ferred the right to strike and took away from the states all power to regulate strike activities. Does the Solicitor mean to infer that a minority union in a collective bargaining unit can demand a closed shop of an employer or recognition as the exclusive bargaining agent where the National Board has certified a majority union as the exclusive bargaining agent, etc., and carry on all activities directed against an employer to attain these ends, that they could carry on, if they were a majority union making lawful demands which the employer could meet; that the National Act conferred upon minority unions such rights and that the State can do nothing to protect an employer so circumstanced? The Solicitor talks about legitimate grievances. Legitimate grievances can be analyzed only with respect to specific situations.

The Solicitor concludes his analysis by the statement:

"On the foregoing analysis of the two statutes, the same employer and the same employees will have different status, rights and privileges arising from the same set of facts."

This statement is not justified either with respect to analysis of the substantive provisions of the Act or the operation or administration of it.

ANALYSIS OF THE STATE BOARD CASES CITED IN THE APPENDIX TO SOLICITOR'S BRIEF.

Appendix B attached hereto is the State Board's statement of cases cited in the Appendix to the Solicitor's brief; with respect to other matters referred to in said brief and in the reply brief of the appellants. It is a correct statement of the four cases which the Solicitor relies upon and which the National Board relies upon to establish the conclusion that the State statute in its practical operation stands as an obstacle to effectuation of the federal policy as set forth in the National Act.

In relation to Case 1, cited in the Appendix, the General Counsel for the National Board refers to "minor violence". The Solicitor assumes that this case involved only such activities. There is obviously too much loose talk of such nature both in the Solicitor's brief and in the Appendix, —talk about something about which none of the parties submitting the matter appear to be well informed. The instant case was by no means confined to "minor violence". The record before the Board consists of something over 650 pages without exhibits. A woman employee who wanted to work during the strike was so injured in attempting to go to work that she subsequently sued the City of Milwaukee for failure to perform its statutory duty to furnish her protection against acts of violence and recovered a judgment against the city for \$1500.00.

The conduct engaged in by the union and its members in this case would not be tolerated in any civilized society. It was a record which would have justified injunctive relief in any court in the land and by provisions similar to those in the Board's Cease and Desist Order.

It is further stated in relation to this case that "as a result in part of the proceedings before the State Board, the strike was abandoned on August 4, 1939." Just what does the Regional Director know about what actually motivated the abandonment of the strike? And if the State Board's order which required the ceasing of activities recognized as unlawful in any civilized society did result in abandonment of the strike, is the Board to be inferentially criticized for same? Just wherein did the Board's action impede the effectuation of the policies of the National Act? The glaring inaccuracies in the National Board's report upon this case are sufficiently covered in the State Board's statement with respect thereto. The facts in relation to other cases cited in the Appendix to the Solicitor's brief are sufficiently stated by the State Board (Appendix B).

ANALYSIS OF STATE BOARD'S CASE CITED BY THE APPELLANTS IN THEIR REPLY BRIEF.

We have no intention of making a full factual presentation of every State Board case cited by the appellant in its reply brief. It appears from the Board's statement with reference to these cases that they all come within the working agreement which the State Board had with the National Board. If the National Board wished the State Board to refrain from acting in any of such cases, all that it had to do was say so. It did not say so and all that the State Board did was to go ahead and act in accordance with its understanding and agreement with the National Board. The National Board states in its report (see Page 9 this brief) that it "has never been jealous of its jurisdiction." Counsel for the appellants are apparently jealous

of the National Board's jurisdiction. They apparently know more about when the National Board should take jurisdiction and when the State Board should not than the National Board itself.

Attached as Appendix C is a decision of the Board in the matter of Allis Chalmers Mfg. Company and Independent Union of Allis Chalmers Employees which exhibits very clearly the Board's policy with respect to collective bargaining units where the National Board has acted with respect to the establishment of same even though the situation has considerably changed since the National Board acted. The State Board simply refuses to interfere and leaves it to the National Board to establish new bargaining units if it deems the changed situation requires such action.

Further, it is very essential to have a full factual presentation of any case before any conclusion can be reached with respect to same. Further, the language of the Board in any particular case has to be read in the light of the full factual situation of that particular case.

The appellants attempt to show (pages 11-13 inclusive) that we were in error in our statement that the Board has never considered Section 111.06 (1)-(e) when read in connection with Section 111.02 (5) to prohibit a minority union from bargaining with respect to wages, hours and working conditions with respect to its members only. The appellants cite two cases where they contend the Board adopted the contrary view. You do not prove a point by a mere play upon words. We show in our prior brief where collective bargaining has a definite significance under the Wisconsin Act and that collective bargaining under the Act constitutes bargaining by a majority of employees in a

collective bargaining unit for all employees in that unit. When the Board prohibits collective bargaining in the language of the statute, it is not prohibiting bargaining, as distinct from collective bargaining in the language of the statute, by a minority with respect to its members only.

Anyone wishing to be at all fair about the matter, and particularly local counsel for the appellants, knows full well that the Board has never interpreted the Act to prohibit an employer from bargaining with a minority union with respect to its members only. The cases cited by the appellant upon this point show very clearly that the unions were not attempting to bargain for its members only but were asserting the right to bargain for all in the unit and in one case demanding a closed shop contract when it was apparent that it was not a majority union and had no right to demand either the one or the other. Those are things which the Wisconsin Act seeks to protect against,—union demands which the union has no right to make either under the National Act or the State Act.

Thus in the *Lakeside Bridge* case cited by the appellants (page 15) the union demanded that it be recognized as the exclusive bargaining agency of all the employees. The union membership was shown to be 5 or 6 out of a total of some 169 constituting the bargaining unit. Other unlawful demands were made and insisted upon and were the determining factors in preventing any adjustment of the controversy.

The appellants refer to the *Rock River Woolen Mills* case (Page 17). It would take several pages to tell the full history of that case. Many of the details appear in the decision of the *National Board Case No. R-1615*. Suffice it to say that in 1937 the union involved had an all

union contract with the employer which contract recognized the union as the sole bargaining agency for the company's employees. Before expiration of the extended contract the company received information by cards signed by its employees and by more than a majority to the effect that they no longer wanted the union to bargain for them. The contract expired July 15, 1939. It was extended by stipulation until October 15, 1939, the union agreeing in said stipulation that a consent election should be held by the National Board prior to October 15. The union refused to go through with the stipulation. It obviously knew that it did not represent a majority,—it was having internal trouble. The union devised its strategy so as to prevent any determination of the question of right of representation. On October 9, 1939 it requested the National Board for permission to withdraw its petition for investigation and certification of representatives. From here on it started to play horse with both Boards. The facts are sufficiently detailed in the decision of the National Board above referred to. It attempted to have the National Board certify it as an exclusive bargaining agent without holding an election. It failed and it failed upon every single point that it raised before the National Board. The union insisted upon recognition as exclusive bargaining agent when it knew full well that it was not entitled to any such recognition under either the National or the State law. Its strategy was to try to prevent any determination of that fact by either the National or the State Board, and all to the end that it might continue its unlawful demands against the employer as well as deny to the majority in the collective bargaining unit rights which both Acts seek to foster and protect.

It is not perceived wherein *Allis Chalmers Mfg. Company v. Allis Chalmers Workers Union No. 248* cited by the appellants (page 22) is of any import. We would think that the least said about that case the better so far as the appellants are concerned. The decision of the Circuit Court for Milwaukee County in relation to the case will be found in C. C. H. and reported as *Allis Chalmers Workers Union v. W. E. R. B.*, 4 L.C. 40, 429 decided April 3, 1941. In that case the strike was called against this company employing some 8,000 men and having something in excess of \$45,000,000 war contracts. The plant was entirely closed down so far as production was concerned, for a period of nearly three months. The employees suffered a wage loss in excess of \$2,500,000. The union and the election committee in conduct of the strike vote caused at least 2,200 ballots to be marked as favoring the strike and caused such ballots to be counted and reported as votes of individual employees of the company in favor of a strike which were in fact forgeries and conceded to be such. The Secretary of the Navy demanded that the company resume operations. The company endeavored to comply and this resulted in rioting to the extent that the Governor of the State appealed to the National Government for armed forces. It would take a bold person to assert that the union's loss of its case in the Circuit Court with respect to the State Board's Order was not at least of some help to the War Labor Board in finally bringing about a resumption of work.

CONCLUSION

The only cases cited by the General Counsel for the National Board in the Appendix to the Solicitor's brief as calculated to show that the State Act in its operation impedes the federal policy, are cases which, when analyzed in the light of their facts, are lacking in substance with respect to impediment. Further, they are all cases involving the State Board's use of its election machinery. They are instances which could occur if the State Board were administering the State Act up for consideration in the case of *Wis. L. R. Bd. v. Fred Rueping L. Co.*, 228 Wis. 473; 279 N. W. 673 (1938),—that is the 1937 Act. They do not demonstrate any conflict in the Act itself. It is most difficult to understand why the National Board has made no effort to iron out any dissatisfactions that it has with respect to election matters. It is most difficult to understand why the National Board, if dissatisfied, has not at least arranged for a discussion as it said it would do in its letter of December 29, 1939, to wit:

"In the event any occasion for a further discussion arises in the future we will be glad to arrange for such a discussion."

The cases cited are all cases that would evaporate out of the picture by the mere arranging for and holding of such a discussion or conference. The cases cited are not cases which arise out of inconsistencies in the two laws. They are cases involving administrative problems which will arise in the administration of any law. If, when administrative problems arise, the dissatisfied agency keeps its dissatisfaction to itself and makes no effort to eliminate

administrative problems giving rise to dissatisfaction, it can hardly be concluded that the law stands as an obstacle to effectuation of the federal policy. Reasonable men can always overcome without difficulty problems in administration. It appears clearly from the State Board's statement that the State Board was under the impression that it was administering the state law with respect to election matters with the entire approval and in harmony with the wishes and desires of the National Board.

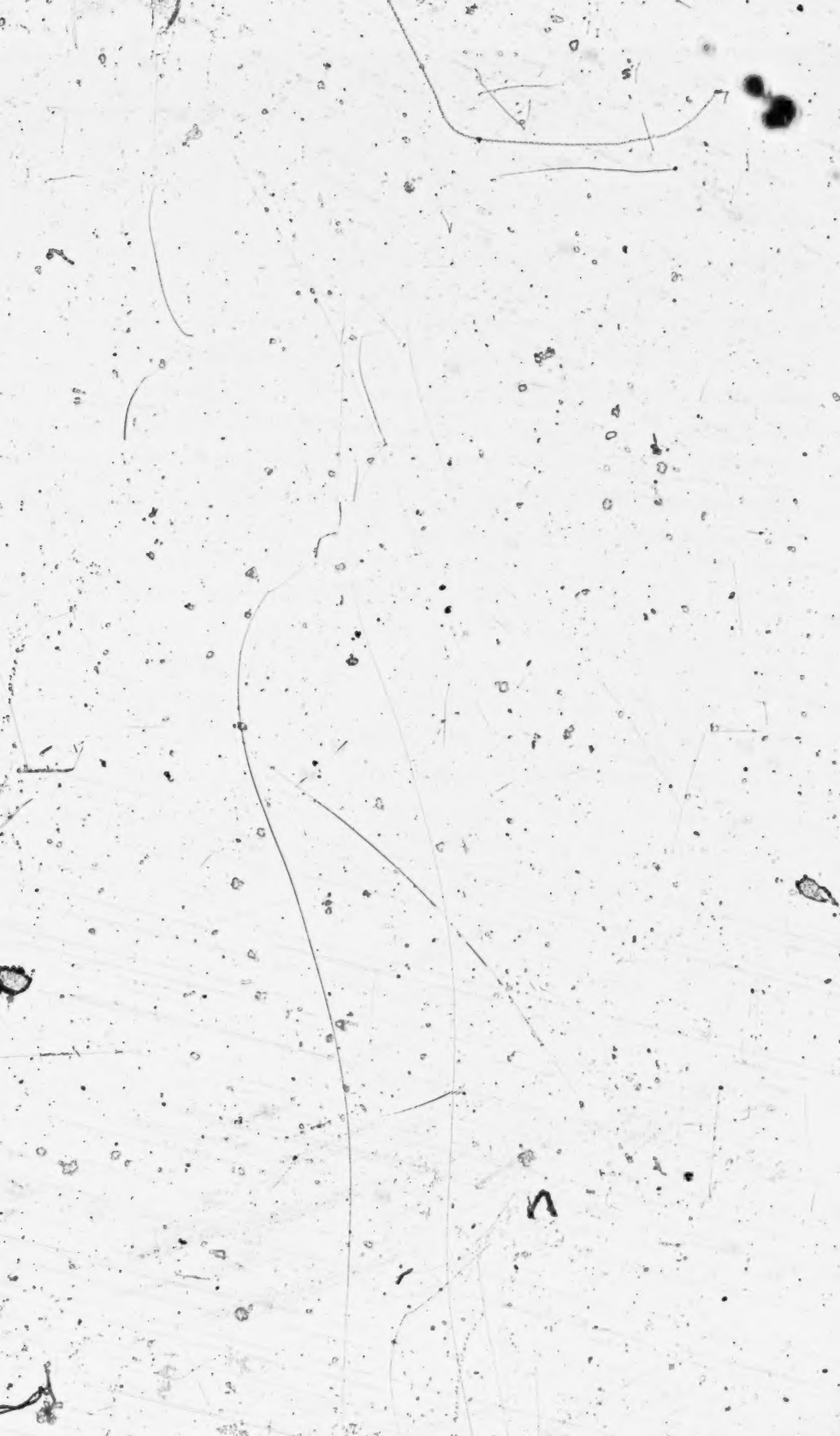
Respectfully submitted,

JOHN E. MARTIN,
Attorney General;

JAMES WARD RECTOR,
Deputy Attorney General,

N. S. BOARDMAN,
Assistant Attorney General,

Counsel for Respondent,
Wisconsin Employment Relations Board.



APPENDIX

EXHIBIT A

NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

December 29, 1939

Henry C. Fuldner, Chairman
Wisconsin State Labor Relations Board
Madison, Wisconsin

Dear Mr. Fuldner:

This has further reference to the conference held between members of your Board and this Board in the office of Chairman Madden in Washington on Tuesday, December 5.

This Board is gratified that to date there has been no evidence of friction between your Board and ours. The Board is confident that there need be no friction in the future.

Since it may be helpful to relations between the two Boards, this Board is prepared to state that ordinarily it will not assume jurisdiction in cases in Wisconsin involving hotels, restaurants, laundries, dry cleaning establishments, beauty parlors, garages and other service industries, hospitals, cemeteries, retail stores, local transportation, local utilities, building and construction contractors. You will appreciate of course that cases may arise in any one of these industries or services which would warrant this Board in taking jurisdiction. This Board also knows that you appreciate that in the event of a conflict of jurisdiction, the jurisdiction of the Federal Government is supreme.

In the event any occasion for a further discussion arises in the future, we will be glad to arrange for such a discussion.

Very truly yours,

(Nathan Witt)

Nathan Witt,
Secretary

EXHIBIT B

BOARD'S STATEMENT OF CASES CITED IN APPENDIX TO THE SOLICITOR'S BRIEF; WITH RESPECT TO OTHER MATTERS REFERRED TO IN SAID BRIEF AND IN THE REPLY BRIEF OF THE APPELLANTS.

1. ALLEN-BRADLEY CO., N.L.R.B. Case No. XII-C-473; W.E.R.B. Case No. 6 CW-1.

It is stated that it is understood that the above case is the same case as that which is now pending in this Court. It is not the same case. It does involve the same company. The Board completed its hearing in the case at bar on June 30, 1939. The record shows no complaint of any kind filed with the National Board. The Appendix states that complaint was filed with the National Board on July 1, 1939. The Appendix states that on July 13, 1939 the State Board issued a decision finding that the union and 14 of its members had committed unfair labor practices under the State Act through mass picketing and minor violence and ordered that they cease and desist therefrom. The decision of the Board on July 13 was an interlocutory order. This order made no reference, either in the findings

of fact or conclusions of law, with respect to the fourteen members having committed unfair labor practices. The final order in the case at bar, dated February 1, 1940, in conclusion of law No. 2, concluded that the fourteen named employees were guilty of unfair labor practices (R. 16). The Appendix states:

"On September 29, 1939, the Union amended its charges of unfair labor practices pending before the National Board. Thereafter pursuant to action taken by the regional office of the National Board, these charges were settled prior to issuance of a complaint by the National Board; the settlement included the reinstatement with full seniority and other rights and privileges of six employees who, the Union had charged, were discriminated against in violation of Section 8 (3) of the National Act. * * * Thereafter, in 1940, the State Board upon petition of the employer conducted an election among the employees to determine collective bargaining representatives, but excluded from the voting the said 14 employees, including the six employees who had been reinstated with full seniority and other rights and privileges pursuant to action taken by the regional office of the National Board. The State Board thus disenfranchised six persons who under the National Act were apparently employees like all other employees and entitled to all the rights and privileges pertaining to employee status."

At the time of the holding of the election in question the Board had no information with respect to any claim that there were persons entitled to vote who did not vote. No claim was made at the hearing that there were persons entitled to vote whose names did not appear upon the company's payroll. As shown by the affidavit of Leo Mann,

attached hereto and marked Appendix B-1, the company had discharged some twenty employees in August, 1939. This did not appear at the hearing before the Board on the company's petition for election. The company filed a petition for this election on September 9, 1940; hearing was held upon the petition on September 24, 1940; order for election was entered October 7, 1940; the election was conducted October 30, 1940 and the Board certified the results November 12, 1940.

The statement in the Appendix makes it appear that the Board deliberately disenfranchised and kept from voting six employees whom the National Board had succeeded in having the company reinstate and that they were reinstated prior to the holding of the election conducted by this Board. The affidavit of Leo Mann, attached hereto, shows that these employees were not reinstated by the company until after December 16th, 1941,—over a year after this Board held the election in question.

There was not at that time and never has been any proceeding before the National Board relating to the investigation and certification of representatives of employees of the Allen-Bradley Company that has been brought to the attention of this Board. The National Board did not request this Board not to hold this election. When the National Board is interested in having this Board hold up election proceedings pending some action by that Board, it has never hesitated to make such request and this Board has never refused to comply with such a request. At the conference held in Washington, referred to in Exhibit 1, the arrangement made with the National Board at that time was that when that Board wished this Board to withhold action in any election cases where charges were pend-

ing before the National Board involving either the question of company domination of a union or discriminatory discharges for the purpose of discouraging membership in the union, the National Board would request the State Board to withhold its action and this Board agreed that it would do so. This Board agreed that it would withhold action on petition for an election until such time as the National Board would have an opportunity to complete its investigation of the charges and determine whether or not to issue a complaint. The National Board agreed that in all cases it would be able to complete such investigation in not more than sixty days. If the National Board did not desire this election held at this time it had only to make such request pursuant to the working understanding between the two Boards.

2. *NORTHERN STATES POWER CO., N.L.R.B., Case No. (XII-RE-3) RE-31; W.E.R.B., Case No. 1, No. 397 E-138, Decision No. 283.*

This case is one with respect to which there is no need for any similar occurrence in the future. At the time this Board determined to hold an election the National Board had made no determination with respect to the appropriateness of the existing collective bargaining unit. The Board had simply dismissed the petition without hearing. If the Board in its dismissal had stated, as it now states in its Appendix, that it deemed the existing bargaining unit the appropriate unit and the Eau Claire unit inappropriate, that would have concluded the matter. The National Board had not done so and this Board was unable to determine with any degree of certainty that the National

Board had made any determination at all with respect to the appropriateness or inappropriateness of the Eau Claire unit.

The International Brotherhood of Electrical Workers brought suit against this Board to enjoin the Board from conducting the election and as an *ex parte* matter procured an order to show cause as to why a temporary injunction should not issue pending final hearing upon the petition, and in the interim, likewise as an *ex parte* matter, procured a temporary stay order restraining the Board from conducting the election pending the hearing on the application for temporary injunction.

The attorneys who procured the temporary stay order took the matter up with this Board and its counsel in the Attorney General's office and the Board and its counsel agreed to let the temporary stay order stand until such time as a petition to the National Board for determination of the appropriate unit could be acted upon and disposed of by the National Board. The *modus operandi* for effectuating the above result was by counsel for the union and counsel for the Board agreeing upon various postponements with respect to hearing upon the application for temporary injunction and thus in the interim permitting the temporary stay order to govern. This necessitated various agreements with respect to adjournment,—adjournment having in each case been to a specific date,—and the National Board not having disposed of the matter by the time the adjourned date was reached.

When the National Board did act and determined the appropriate unit, dismissal of the court case was agreed upon by stipulation of the parties, order of dismissal was

entered by the court and this Board in turn dismissed the proceeding before it.

It is unfortunate that the National Board in dismissing the first petition did not state its reasons for dismissal so that this Board could determine that the National Board considered the existing bargaining unit the appropriate unit. So far as this Board was concerned all matters were worked out amicably with all parties involved in all of the proceedings and to the end that the National Board might determine the appropriate unit if it desired to do so. It is stated in the Appendix:

"The I.B.E.W. threatened to strike if the Company recognized the U.M.W. even if the latter won the State Board election; indeed the I.B.E.W. threatened to strike if the State Board even proceeded to hold the election."

The Board is not advised with respect to the threats. Whatever threats were made it is apparent that in the light of the factual situation and the handling of the case by the Board and its attorneys there never was any serious strike situation at the plant due to any action of this Board.

3. *FOX RIVER VALLEY KNITTING CO., N.L.R.B. Case No. XII-C-742; W.E.R.B. Case No. 1, No. 432-E-149.*

In this matter petition for election was filed by the so-called Independent Union with this Board on August 25, 1941. At the hearing the International Ladies Garment Workers Union appeared and objected to the holding of an election by this Board on the ground that charges were

pending before the National Board filed on July 18, 1941, and that a petition for investigation and certification had been filed with the National Board on July 26, 1941. The State Board hearing was held on August 29, 1941. On September 13, 1941 the Regional Director of the National Labor Relations Board was contacted by the Executive Secretary of this Board to check the status of the proceeding before the National Board and was informed that nothing was being done on the investigation at that time because no Field Examiner was available for the assignment. On September 23, 1941 at a meeting of this Board, the Board voted to suspend further action until October 30 in order to allow the National Board time to complete its investigation of the charges and to dispose of the petition for election. On October 27, 1941, the Regional Attorney and the Field Examiner of the 12th Regional Office conferred with this Board and advised the Board that the investigation had been completed; that the Field Examiner had recommended the issuance of a complaint and that a complaint would be issued within a week and a hearing probably be held thereon between ten and twelve days after its issuance and requested the Board to hold the case in abeyance for such period of time. The matter was held in abeyance until November 27, at which time the Board made an order directing an election. Up to that time no complaint had been issued by the National Board against the company. On November 28, 1941 the Regional Director of the National Board telephoned to inquire whether an order of election had been issued and was informed that the order was signed and issued the day before. He then requested that the Board delay scheduling the election for a period of a week or ten days stating that the National

Board had prepared a stipulation which had been transmitted to the parties in interest several days before. The stipulation provided for the disestablishment of the Independent Union as a collective bargaining agency of its employees. The Director at that time stated that he felt the parties might agree to the stipulation. He further stated that if the parties refused to execute the stipulation the National Board would feel compelled to issue a complaint against the company on the ground of company domination of the Independent Union but that he knew the employees did not want the International Ladies Garment Workers as bargaining agent and in all probability would organize another independent union anyway. This information was conveyed to this Board and the scheduling of the election was accordingly delayed pursuant to the Regional Director's request.

Thereafter, on December 27, this Board having heard nothing further from the Regional Director, wrote advising him that pursuant to his telephone request of November 28 it had postponed arranging for the election which had been ordered on the preceding day and asked what disposition had been made by the National Board in the negotiations regarding the stipulation. On December 29 the Regional Director notified this Board that the stipulation was signed on December 12 and that the National Board was conducting an election at the employer's plant on December 31. A copy of the stipulation was received from the National Board on January 10, 1942 and upon receipt of such stipulation an order was made by this Board dismissing the proceedings.

At no time did the Regional Director ever inform this Board that its action of November 27 in ordering an elec-

tion had at all interfered with any "tentative agreement" previously reached or at all interfered with or made more difficult the final agreement by stipulation. Since receipt of the Solicitor's brief the Board has called the attorneys for both the Independent Union and the International Ladies Garment Workers. Both attorneys advise that neither union had any intention of striking or ever threatened strike, either before this Board's action of November 27 or thereafter. The Board was further advised by the attorney for the Independent Union by telephone on December 5 that there was a strong possibility that the Independent would sign the National Board's stipulation which provided for dissolution of the union and requested that the Board not schedule the election. This attorney advised on December 10 that the Independent had approved the stipulation and suggested that the Board withhold scheduling the election. The attorney for the Independent further advises us that the Independent's attitude did not change at all as a result of this Board's action of November 27 ordering an election. He states that the union was no more difficult to deal with thereafter than it was before.

4. CREAMERY PACKAGE MFG. CO., N.L.R.B. Case No. (XII-R-341) R-2705; W.E.R.B. Case III, No. 348 E-117.

The facts with reference to the dates and the proceedings conducted before the State Board and the National Board are approximately correct. The only issue involved before either Board was as to whether certain employees were confidential employees and thus should be excluded from the collective bargaining unit. The unit involved was a unit of office employees. There were some twenty-three

such employees. There were seven with respect to whom there was no dispute. The company claimed that sixteen were supervisory or confidential employees and should not be included in the unit. The union claimed that of such sixteen all should be included except five which they conceded to be supervisory or confidential. This Board held with the union and concluded that eighteen were entitled to vote.

The National Board, after holding its hearing, concluded that one employee listed as stenographer, who makes reports of a confidential nature to the general office and who has taken dictation concerning labor problems in the plant, receives information which appears to be confidential and directly related to the problem of labor relations, should be excluded on that ground and was excluded.

The difference in the unit thus established was one employee which this Board thought was entitled to organizational benefits and which the National Board concluded was not.

This Board was advised by the attorney for the company involved that they were considering a refusal to bargain with the S.W.O.C. pending court proceedings. Their refusal to bargain, however, was based not on any conflict in the findings but was based on the fact that both the National Board and the State Board had included within the unit several employees whom they contended were not entitled under either law to the benefits of collective bargaining because of the confidential relationship they had with the company. Any threat of strike that there may have been (if there was any) was undoubtedly because of the company's refusal to recognize the right of so-called confidential employees to bargain collectively.

This Board has been most anxious to avoid any conflicts in administration of the two acts. We have always looked upon secs. 111.17 and 111.18 of the Statutes as an express mandate to us to so administer the state law as not to thwart any policy of the National Act and as an express mandate to us not to apply the Act or any provision of it to circumstances which would involve intrusion upon the federal domain. We accordingly requested the conference with the National Board which was held in December, 1939. At the conference various features of the state law were discussed, including the matter of holding elections for purposes of determining bargaining units,—units which might be established by the vote of the affected employees under the state law. The matter of this Board conducting elections generally was discussed. We pointed out that whenever we conducted elections for any of the purposes for which elections may be conducted under the State Act, the result of the election would prevail only until such time as the National Board concluded that it ought to step into the picture either for purposes of determining a different collective bargaining unit from that established under the state law or for purposes of verifying or holding an election with respect to other matters determined by state elections. The National Board at the time manifested no concern about the matter of this Board proceeding with elections in any situation except situations where the National Board had pending before it charges of employer unfair labor practices and particularly charges involving company dominated unions. In such situations the National Board requested us not to proceed with elections until it had an opportunity to investigate the charges filed. We have already set forth the substance of the Na-

tional Board's request and the State Board's agreement in this regard.

We suggested weekly clearance between the National Board and this Board with respect to cases, so that there might be no friction or question of this Board interfering where the National Board deemed it important that it handle a particular situation. The National Board apparently did not feel that such was necessary or desirable. No friction or clash had developed and apparently the National Board thought that the two acts could be administered in promotion of the federal policy by existing procedures.

The Board Secretary stated in his letter to us dated December 29, 1939 (Ex. A):

"This Board is gratified that to date there has been no evidence of friction between your Board and ours. The Board is confident that there need be no friction in the future.

"* * *

"In the event any occasion for a further discussion arises in the future, we will be glad to arrange for such a discussion."

This Board has felt no small degree of pride in the cooperation and assistance which it has given the National Board in the administration of its Act. We have endeavored to administer the state Act in complete harmony with all understandings arrived at in the conference at Washington in December, 1939. We have administered the Act since that date as we were administering it before that date.

So far as this Board knows, it has never certified an independent union as a collective bargaining agent in any

instance where the National Board has subsequently had occasion to disestablish the union.

If the National Board now feels that this Board has conducted elections in situations where the Board should have refrained from conducting such elections and that our conducting of same has actually impeded the administration of the National Act, it would seem that pursuant to the Board's letter of December 29, 1939—"In the event any occasion for a further discussion arises in the future, we will be glad to arrange for such a discussion."—the sensible thing to have done would have been to discuss the situation with this Board and arrive at some new understanding consonant with what the National Board deems necessary to effectuate the federal policy. A single conference could iron out any misunderstandings. This Board has never been advised by the National Board or its regional office or any of its representatives that those charged with the duty of administering the National Act had any complaint of any kind to make with respect to the manner in which this Board has been administering the state Act. At the conference at Washington the National Board even pointed out that its own election machinery was slow and that state election machinery was much more adapted to a speedy determination. All parties seemed agreed that speedy determinations in election matters were desirable. All cases referred to in the Appendix to the Solicitor's brief involve cases with respect to use of the election machinery of this Board.

The National Board will continue to receive the full cooperation of this Board in all phases of its administration of the national law.

We have read the attached brief of the Attorney General with respect to proper interpretation of the various sections of the Wisconsin Act discussed in the brief. We are in full accord with the interpretation placed upon these sections by the Attorney General. Having regard to the factual situation of particular cases, we know of no instance where we have in the past administered the Wisconsin law in any manner inconsistent with any such interpretations.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Henry C. Fuldner
Henry C. Fuldner, Chairman
L. E. Gooding
L. E. Gooding, Commissioner
R. Floyd Green
R. Floyd Green, Commissioner

EXHIBIT B-1

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

Leo Mann, being first duly sworn, on oath, deposes and says:

(1) I am a member of the firm of Lines, Spooner & Quarles, who for many years have been attorneys for Allen-Bradley Company. I have had personal charge of all legal matters in connection with the strike at Allen-Bradley Company and Labor Board proceedings in connection therewith, as well as with all negotiations incident to the settlement of Charges filed by the Union and pending before the National Labor Relations Board.

(2) This affidavit is made in connection with certain statements made by Mr. Robert B. Watts, General Counsel for the National Labor Relations Board, in a letter by him addressed to Honorable Charles Fahy, Solicitor General of the United States, which is printed as an Appendix to the Solicitor General's Brief. The letter refers to certain phases of the Allen-Bradley Company labor matters and settlement of Charges filed with the National Labor Relations Board. This affiant participated personally in all of these matters and makes this affidavit from personal knowledge of the facts.

(3) The Company filed its Complaint against the Union and employes before the Wisconsin Labor Relations Board on June 5, 1939. The hearing before the Wisconsin Labor Relations Board on this Complaint ended June 30, 1939. The Union filed its first Charges with the National Labor Relations Board on July 1, 1939.

(4) By letters dated August 17, 1939, and August 29, 1939, the Company discharged 20 employees for various acts of violence and breaches of the peace committed by them which interfered with the Company's business and with employees who wanted to work during the strike.

(5) The Union filed Amended Charges with the National Labor Relations Board on September 30, 1939. They included the charge of improper discharge of these 20 employees.

(6) On September 9, 1940, the Company filed a Petition with the Wisconsin Labor Relations Board for an election to determine whether the Union still represented a majority. The election was conducted October 30, 1940. It resulted in a certification of the Union as the representative of the majority. Thereupon, the Company continued its collective bargaining negotiations and entered into a collective bargaining agreement with the Union.

(7) At the hearing before the Wisconsin Labor Relations Board on this Petition for an election, a letter was presented, signed by the Regional Director of the National Labor Relations Board at Milwaukee, Wisconsin, dated September 24, 1940, stating that the Charges filed had been investigated, and that the Board had directed him to issue a Complaint against the Company.

(8) No such Complaint ever issued. Instead, the Regional Director negotiated with the Company for over a year to settle the controversy, and it was finally settled by written Stipulation dated December 16, 1941. This Stipulation provided for the reinstatement of 6 of the 20 discharged employees. They were reinstated by the Company pursuant to the Stipulation shortly after December 16, 1941.

(9) These persons were not in the employ of the Company from the dates of their discharge in August, 1939, until some time after December 16, 1941. They were not employes of the Company at the time of the representation election held October 30, 1940.

LEO MANN

Subscribed and sworn to before me
this 25th day of February, 1942

RUTH TISCHER

Notary Public, Milwaukee Co., Wis.
My commission expires 4-25-43

EXHIBIT C

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS BOARD

Case No. 119 E-33

In the Matter of
ALLIS-CHALMERS MANUFACTURING CO.,
and
INDEPENDENT UNION OF ALLIS-CHALMERS EM-
PLOYEES.

MEMORANDUM IN RE: PETITION OF INDEPENDENT
UNION OF ALLIS-CHALMERS EMPLOYEES FOR
AN ELECTION.

We are today entering an Order dismissing the petition of the Independent Union of Allis-Chalmers Employees, heretofore filed with this Board, requesting the Board to conduct an election among the production employees of the Allis-Chalmers Manufacturing Company, at the plant of said Company in the City of West Allis, Wisconsin, and are filing this Memorandum of our reasons for so doing.

It appeared at the time of the hearing that the Allis-Chalmers Manufacturing Company is engaged in the manufacture of machinery of various types. The Company has its main plant located in the City of West Allis, Wisconsin. It also has several other plants located in different cities throughout the United States, and the vast majority of its finished product goes into interstate commerce, and the big bulk of its raw material is derived from sources outside the state of Wisconsin. It appeared to be clear that

the operations of the Allis-Chalmers Manufacturing Company are such that without question the National Labor Relations Board would have jurisdiction of any question relating to the selection by the employees of a representative for the purpose of collective bargaining any time that such jurisdiction was invoked by a proper procedure. It further appeared that heretofore the jurisdiction of the National Labor Relations Board was invoked by the employees of the Allis-Chalmers Manufacturing Company to determine such question, and that after a full and complete hearing and full consideration, such Board did, on the 20th of November, 1937, direct that an election be conducted among the employees of the West Allis plant of the Allis-Chalmers Manufacturing Company to determine what, if any representative was desired by the employees of various bargaining units set up by such order. Thereafter, the National Labor Relations Board conducted such an election, and as a result of such election, on the 9th day of February, 1938, certified that Local No. 248, International Union, United Automobile Workers of America, affiliated with the Committee for Industrial Organization, had been selected by a majority of the production employees of the West Allis, Wisconsin plant of the Allis-Chalmers Manufacturing Company, as the representative of such employees for the purpose of collective bargaining. Ever since such time, Local 248 has acted as such representative and has negotiated with the Allis-Chalmers Manufacturing Company on behalf of all of the production employees, as directed by such certification made by the National Labor Relations Board.

After Local 248 was so certified by the National Board as the bargaining representative of such production employees, and some time in March of 1939, the Independent

Union of Allis-Chalmers Employees was organized and has since conducted a campaign among the production employees of the Company for members, with a view of eventually representing such employees in collective bargaining with the employer. This union has now filed with the Wisconsin Employment Relations Board a petition requesting this Board to conduct an election to determine who the production employees of the West Allis plant of the Allis-Chalmers Manufacturing Company desire as their bargaining representative, and claim that if an election were now held, a majority of the employees would select such Independent Union as their bargaining representative.

We have consistently taken jurisdiction when requested by the employees of any manufacturing plant located within the State of Wisconsin, of questions concerning the representation of such employees for the purpose of collective bargaining, irrespective of whether the operations of such plant had an effect on interstate commerce or not, and would do so in this case, were it not for the fact that heretofore the jurisdiction of the National Labor Relations Board had been invoked, and such Board has made a determination. It is true that the National Labor Relations Board has frequently held that a certification of the representative of employees made by it may be changed whenever there is a change desired by a majority of the employees. That Board has usually considered such a certification as valid for a period of at least one year, but has never held, after such a period, that the fact that there has been a prior certification of one union, prevents the Board from making an investigation to determine who the employees presently desire as their bargaining representative. It does not follow from this, however, that because

Local 248 was certified as the bargaining representative for production employes by the National Labor Relations Board more than one year ago, that the certification is no longer in effect, and that it is mandatory upon this Board, upon the filing of a petition, to order an election and determine the question of who now is a proper bargaining agent for the employes of this Company. If any change is to be made in the certification of a bargaining agent, it properly should be made by a Board which clearly has jurisdiction of the question, and whose jurisdiction has been invoked heretofore by the employes of the Company, and by whom an order has heretofore been made determining the question.

The Wisconsin legislature, by the passage of the Wisconsin Employment Relations Act and the creation of this Board to administer such Act, declared the policy of the State of Wisconsin that the important feature of the law to be constantly kept in mind by the members of the Board was that such legislation was passed with a view of bringing about industrial peace insofar as such a result could be obtained by legislation. We have endeavored, in all cases submitted to us, to clearly keep in mind this declaration of policy. We recognize in the case now before us, that peaceful relations in a large manufacturing plant such as here involved, can easily be disrupted by disputes between competing unions. At the same time, we recognize that the National Labor Relations Act was passed by Congress, and that Congress also had in view the importance of the maintenance of industrial peace. We recognize the fact that the National Labor Relations Board, created by Congress to administer the National Labor Relations Act under the decisions of the courts, has jurisdiction over questions

similar to the question here attempted to be raised, and that long prior to the creation of this Board, the jurisdiction of that Board was invoked in a proper proceeding, and after an election, Local 248 was properly certified as the bargaining representative of all of the production employees. The National Labor Relations Act is still in effect, and the National Labor Relations Board still has jurisdiction of such question. If we were to assume jurisdiction in this case, and there resulted from such assumption of jurisdiction a result different from that determined by the National Labor Relations Board, and we were to certify some other bargaining representative for the production employees of this Company, it could only result in confusion and chaos, and certainly would be of no aid in bringing about industrial peace at West Allis. Such a result would upset present contractual relations between the Company and its employees, would undoubtedly result in litigation, and could easily result in a condition in which the Company would be unable to successfully bargain with any representative of its employees for a long period of time.

It is therefore, our conclusion that in view of the fact that the jurisdiction of the National Labor Relations Board has been invoked by the employees of the Allis-Chalmers Manufacturing Company for the purpose of determining questions relating to the representative of such employees for the purpose of collective bargaining; that in February, of 1938, Local 248 was duly certified by such Board after an election properly conducted, as the representative of the employees involved in this proceeding; that since such time the Company has bargained collectively with its employees through the representative so certified; that if the employees of the Company desire such representative to be

changed, the new certification should be made by the National Labor Relations Board, and that this Board must therefore refuse to attempt to certify any representative as the bargaining representative of such employees.

Both the Wisconsin Employment Relations Act and the National Labor Relations Act were passed for the purpose of reducing industrial strife; both are binding and affect certain employees and certain employers within the State of Wisconsin. In the administration of the Wisconsin Employment Relations Act, it has been and will continue to be the effort of this Board to avoid any conflict in such administration, and were we to assume jurisdiction in this case, such conflict would immediately be present unless Local 248 was still the choice of a majority of the employees of this Company. In dismissing this petition, no right of any employee of the Allis-Chalmers Manufacturing Company is in any way infringed. The Independent Union of Allis-Chalmers Employees may, if they see fit and honestly believe that a majority of the employees of this plant desire a change in their bargaining representative, petition the National Labor Relations Board to make an investigation and certify them as the bargaining agent of such

employees. This we believe to be the proper and only course to be taken.

Given under our hand and seal at the City of Madison, Wisconsin, this 24th day of May, 1940.

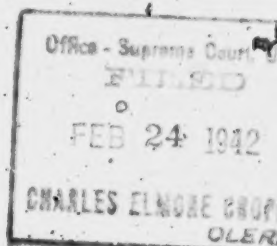
**WISCONSIN EMPLOYMENT RELATIONS BOARD
[SEAL]**

By Henry C. Fuldner
Henry C. Fuldner, Chairman

L. E. Gooding
L. E. Gooding, Commissioner

R. Floyd Green
R. Floyd Green, Commissioner

FILE COPY



No. 252

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1941,

**ALLEN-BRADLEY LOCAL No. 1111, UNITED ELEC-
TRICAL, RADIO AND MACHINE WORKERS OF
AMERICA, Et AL., APPELLANTS,**

v.

**WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY, RESPONDENTS.**

**BRIEF AMICUS CURIAE OF WISCONSIN STATE
FEDERATION OF LABOR.**

**JOSEPH A. PADWAY,
I. E. GOLDBERG AND
FRED GOLDBERG,**
*Attorneys for Wisconsin State
Federation of Labor.*



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No. 252

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1941

ALLEN-BRADLEY LOCAL No. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, ET AL., APPELLANTS,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD
AND ALLEN-BRADLEY COMPANY, RESPONDENTS.

**BRIEF AMICUS CURIAE OF WISCONSIN STATE
FEDERATION OF LABOR.**

The Wisconsin State Federation of Labor submits this brief *amicus curiae* because of the vital and direct interest of organized labor in the State of Wisconsin in the questions involved in this case.

The passage of the reactionary legislation known as the Wisconsin Employment Peace Act (Ch. 111, Stats. 1939), the provisions of which are now before this Court for review in the instant matter, has done more to disrupt the collective bargaining process in the State of Wisconsin than any other single factor since its passage. That this has resulted in a burden upon interstate commerce necessarily follows, since there are many communities in Wisconsin, such as

Milwaukee, which furnish to the world many different brands and types of machinery and machine products. Restrictive provisions of the law have been used as a club over employees and labor organizations, with the result that the national policy of the United States as declared in the Norris-LaGuardia Act and the National Labor Relations Act has been thwarted and suppressed. And while a decision of this Court invalidating the Wisconsin Employment Relations Act as it applies to employers and employees within the jurisdiction of the National Labor Relations Act will not entirely relieve organized and unorganized labor of the restrictive provisions of that law, at least it will result in freeing a large percentage. That then constitutes the interest of the Wisconsin State Federation of Labor in these proceedings.

Summary of Argument.

This brief will be directed to the following points and argument:

1. It will demonstrate the principal error of the court below, that is, its failure to appreciate that the issue in the instant case is one of *legislative power* rather than *administrative inconsistency*, that the issue is whether or not the State Board *may* exercise jurisdiction rather than *how* it has exercised it.

2. The remainder of the brief will be directed to the salient points of irreconcilable conflict between the National and State Acts here involved.

1.

The Error of the Court Below.

Examination of the decision of the court below will demonstrate that such decision is based upon that court's opinion that whether or not State legislation applicable

to subjects covered by national legislation may validly co-exist with such national legislation does not depend upon any conflict in terms, but rather upon a conflict in administration. In the court's decision, 237 Wis. 164, at 179, can be found the statement:

"The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts, but is one of jurisdiction between the State and Federal Governments. * * *"

And at page 184:

"Conflict between the two acts can arise only with respect to orders issued by each of the Boards dealing with the same situation. * * *"

This holding of the court below did not and does not meet the contentions of the appellants in the instant proceeding.

Throughout these proceedings both before the Board and the court below, the appellants challenged, on constitutional grounds, legislation creating jurisdiction in the Wisconsin Board over the labor relations of an employer who is admittedly subject to the National Labor Relations Act. Appellants urged and now urge that the legislative attempt to create a board with jurisdiction over industries in interstate commerce is void because the statute creating the board is repugnant to the National Labor Relations Act. Appellants assert that the Wisconsin Legislature has exceeded constitutional limits in its effort to extend the jurisdiction of the Wisconsin Board over employers in interstate commerce such as the respondent company.

This contention goes to the question of *legislative power*. It does not raise questions of conflicts in *administration* between State and national administrative agencies. The difference is vital, but was completely overlooked and ignored by the court below.

When Congress, under its plenary power over commerce, entered the field of labor relations, the question immediately and necessarily arose as to the effect of that Congressional act upon the powers of State legislatures in the same field. Usually, the first claim made in such cases is that Congress has pre-empted the field, thus precluding any and all similar legislation by State bodies. That the commerce power of the Federal Government is paramount to and can supersede all State legislation is a securely fixed and undisputed principle of constitutional law. *Gibbons v. Ogden*, 9 Wheat. 1. However, it is equally undisputed that Congressional action need not necessarily be exclusive (*Houston v. Moore*, 5 Wheat. 1). The determining factor distinguishing between these two alternatives is the "intent of Congress." *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681.

We do not in this brief discuss the question of whether or not the Federal Congress has by the adoption of the National Labor Relations Act pre-empted the field of labor relations to the exclusion of any action of the State. We do not view this case as a case dealing with the question of pre-emption, since even if Congress had not pre-empted the field, it would, nevertheless, be outside the authority of the State Legislature to pass inconsistent legislation covering matters in the field covered by the Federal legislation. If Congress had pre-empted the field, then the State could not validly pass any legislation dealing with the same subject matter in so far as its application to interstate commerce is concerned. Where Congress has not pre-empted the field, the State may pass supplementary legislation. *However, a failure to pre-empt the field does not give to States the right to pass any legislation dealing with the same subject matter. The legislation which is passed must be consistent with and not repugnant to the national legislation.* Therefore, even if we were to concede

in the instant case that the Congress has not pre-empted the field, we, nevertheless, have the right to challenge the instant legislation. While under such circumstances we might not challenge the power of the legislature of the State of Wisconsin or any other State to pass labor relations laws, we may, nevertheless, challenge the passage by the legislature of the State of Wisconsin of a particular law, namely, the Wisconsin Act of 1939, on the ground that such particular law is repugnant to the National Labor Relations Act.

To state it otherwise: In some instances a Congressional enactment prevents the State from passing any laws on the subject. Where, however, the power of the State to pass laws on the same subject is not wholly removed, it still may not enact laws on the subject which are repugnant to the Congressional enactment. *Cloverleaf Butter Company v. Patterson*, 86 L. Ed. Advance Opinions 486 (decided February 2, 1942).

Both the majority and the dissenting opinions in the *Cloverleaf* case, *supra*, recognizes that simple proposition of law. In the majority opinion, it is stated:

“But where the United States exercises its power of legislation so as to conflict with a regulation of the State, either specifically or by implication, the *State legislation becomes inoperative* and the Federal legislation exclusive in its application.” (Emphasis ours.)

In the dissenting opinion by Mr. Chief Justice Stone it is pointed out that an enactment of Congress will “strike down a State statute” if such State Act “*in terms* or in its practical administration, conflicts with the Act of Congress or plainly and palpably infringes its policy.” (Emphasis ours.) Both of such statements are buttressed by ample citation of authority.

The pertinent point is the holding of this Court that the State legislation “becomes inoperative” or “is struck

down." Obviously then, where legislation of the State is on its face repugnant to the policy, terms and administration of the National legislation, the question is not whether the State enforcement agency will ignore such repugnancy but rather whether the State agency *may in the first instance assume jurisdiction over the matter*. It is not a question of administrative conflict, but a question of legislative power.

It is clear under the cases that if the Wisconsin legislature has passed an act that is repugnant to the National Act, then the manner and method of administration by the State Board is wholly irrelevant. Indeed, we may go so far as to state that, even should the State Board, in cases involving employers who are subject to the National Act, attempt to administer the Act in such a way as to avoid conflict with administration of the National Board, it would still not save the validity of such a State statute. For obviously, no administrative jurisdiction that is created unconstitutionally can be exercised in any manner—constitutionally or otherwise. **IN LEGAL CONTEMPLATION, SUCH A JURISDICTION WAS NEVER CREATED. AN UNCONSTITUTIONAL, VOID LEGISLATIVE EFFORT CANNOT, LEGALLY, ESTABLISH ANY JURISDICTION WHATEVER.**

In brief, the question of conflict in administration is irrelevant to the disposition of the basic issue in this case.

This Honorable Court states the true issue in the following language:

4
 "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, **IN VIEW OF ITS NATURE AND OPERATION, MUST BE DEEMED TO BE IN CONFLICT WITH THIS PARAMOUNT AUTHORITY.**" (Emphasis supplied.) (*National Labor Relations Board v. Jones & McLaughlin Corporation*, 301 U. S. 1, 57 Sup. Ct. 615.)

Similarly, in the case of *Houston v. Moore*, *supra*, Mr. Justice Story stated:

" * * * It is not to be admitted that a mere grant of such powers in affirmative terms to Congress does per se transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where * * * there is a direct repugnancy or incompatibility in the exercise of it by the states."

See, also, *Gulf, Colorado and Santa Fe Ry. v. Hefley & Lewis*, 158 U. S. 98, 15 Sup. Ct. 802.

In other words, the basic question is whether or not there is conflict between the enactments of the National and State Legislatures. It does not, in this case at least, embrace the problem of conflicting administration of similar acts.

The Conflict Between the Two Statutes.

Appellants' brief sets forth in elaborate detail the conflicts in the provisions of the State and National Acts. There is no need, therefore, further to impose upon the time of this Court by a detailed reiteration of those conflicts. Instead, we shall attempt, by a few illustrations, to indicate the basic and inescapable repugnance between the two Acts.

The formula for ascertaining the existence of that degree of repugnance which would render the State Act unconstitutional as applied to industries subject to the National Act has been set forth in the case of *Gulf, Colorado and Santa Fe Ry. v. Hefley & Lewis*, *supra*:

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement MAY expose a party to a conflict.

of duties. It is enough that two statutes operating on the same subject matter prescribed different rules.” (Emphasis ours.)

Special emphasis should be placed on the use of the word “may” in the above quote since the respondent argues that even though there is a conflict, the statute is not subject to attack until the National Law is put into operation. It is further argued that in such event, all that must be done is to ignore the State Law and the result of the proceedings under it. (The conflict is admitted to exist in the definition of the term “employee” and in the rights granted to such “employee” under the State and Federal Law, as well as in the duties owing by the employer to such “employee” under each law.)

It must be apparent from the cases already cited and from the above quotation in the *Gulf* case that where the very laws are in conflict, the State Law, in so far as it embraces the same field as the National Law, is absolutely null and void. **IT CANNOT CONTINUE TO HAVE VALIDITY UNTIL SUCH TIME AS ACTION IS TAKEN UNDER THE NATIONAL LAW.** The National Act is the supreme law of the land and inconsistent legislation cannot co-exist with it.

Fundamentally, the conflict in the duties imposed on the employers and the rights granted to employees by the two Acts arises from the all important difference between the definitions of the term “employees” as contained in both Acts. Section 2 (3) of the National Act defines that term as follows:

“The term ‘employees’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice,

and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

Section 111.02 (3) of the Wisconsin Act, on the other hand, defines that term as follows:

"The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the federal railway labor act."

Since both definitions contain the term "labor dispute", it is necessary, too, to point out the difference between the definitions of that term in the two Acts. Section 2 (9) of the National Act defines that term as follows:

"The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Section 111.02 (8) of the Wisconsin Act, on the other hand, defines that term as follows:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

That the vast difference in the definition of "employees" must inevitably—by operation of legislative language as distinguished from anything the administrators may do—lead to a "conflict of duties" is readily demonstrable. This grows out of the fact that both Congress and the State have granted in their labor relations acts rights to **EMPLOYEES**, within the meaning of those words as defined in those acts, and imposed duties on employers owed to such **EMPLOYEES**.

For example: Section 7 of the National Act grants to "employees" the right to "bargain collectively through representatives of their own choosing."

To facilitate the exercise of that basic right Congress has created in Section 9 of its Act administrative machinery

whereby the employees' choice of a bargaining representative may be ascertained.

Finally, to give effective substance to that right, Congress, in Section 8 (5) of its Act, has imposed upon every employer the duty "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

Similarly, Section 111.04 of the Wisconsin Act grants to "employees" the right to "bargain collectively through representatives of their own choosing."

To facilitate the exercise of that basic right, the Wisconsin Act has created in Section 111.05 administrative machinery whereby the employees' choice of a bargaining representative may be ascertained.

Finally, to give effective substance to that right, the Wisconsin Act, in Section 111-06(1)(d), has imposed upon every employer the duty "to bargain collectively with the representative of a majority of his employees in any collective bargaining unit."

Thus, both Acts establish for employees a clear and precise statutory right and impose upon employers a clear and precise correlative statutory duty.

The respondent in the instant case, who is admittedly subject to the National Act, is under obligation to perform the duties imposed both by the National and State Acts. But his "EMPLOYEES" are not the same within the meaning of both Acts, and, therefore, it is impossible for him consistently to fulfill both of these duties.

Let us illustrate: Suppose a not unusual rival union situation wherein fifty-one workers in a plant of one hundred have designated Union A to represent them as their collective bargaining agent, and the remaining forty-nine have designated Union B.

Suppose, further, that five of the members of Union A have ceased their employment as a consequence of a dispute

with their employer over their wages, although a majority of the employer's employees are satisfied with their wages and have no dispute with the employer regarding them. By leaving their work for that reason, these five employees automatically lose their status of employees under Sections 111.02 (3), 111.02 (8) and 111.06 (2) (e) of the Wisconsin Act. Hence, under the operation of the Wisconsin law, there would now be forty-nine employees who have designated Union B and forty-six employees who have chosen Union A. Accordingly, by operation of Section 111.06 (1) (d), the employer would have to bargain **EXCLUSIVELY** with Union B.

However, those same five employees would retain their employee status under Sections 2 (3) and 2 (9) of the National Act. Therefore, so far as the National Act applies, there would still remain the original fifty-one selecting Union A and forty-nine preferring Union B. There would still remain, too, the statutory obligation (Section 8 (5)) on the part of the same employer to bargain **EXCLUSIVELY** with Union A. In other words, the one employer would be confronted with the impossible task and duty of bargaining **EXCLUSIVELY** with two different bargaining agents. It is unnecessary for us to multiply the available illustrations demonstrating this and similar conflicts. A conflict in a right and duty so basic to the scheme of both Acts is in itself sufficient to render the State Act constitutionally inapplicable to a business that is subject to the National Act.

The same result would follow if there were no rival union. In the above example Union A, as the result of the strike (under the definition of "employee" or under the provision of Section 111.06 (2) (e), if the dissatisfied employees wanted to state the reasons for the strike) would no longer represent a majority of "employees." Under

the provisions of Section 111.06 (1) (e) it would be an unfair labor practice for the employer to bargain collectively with the union under such circumstance. Under the provisions of Section 8 (5) of the National Labor Relations Act it would be an unfair labor practice if he refused to bargain collectively and in good faith with the same union!

Having referred to the conflict in duty to bargain collectively, it is well to point to Section 111.06 (1) (e) of the Wisconsin Act as a further indication of the inherent repugnance of the State Act to the National Act. The Federal Government has declared it to be its express policy "to encourage collective bargaining." It nowhere limits the meaning of the phrase "collective bargaining" to bargaining with a representative designated by a majority.

In effect, Congress has found collective bargaining with bargaining agents of minority groups—at least until a majority representative has been designated—to be necessary to safeguard "commerce from injury, impairment, or interruption, and to promote the flow of commerce."

* * * "In spite of this Congressional finding and the legislation Congress has enacted as a consequence thereof, the State of Wisconsin has expressly enjoined employers who are engaged in interstate commerce from bargaining collectively "with the representatives of less than a majority of his employees." (See also, in this respect, the case of *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, affirming, under the National Act, the right of an employer to bargain with the representative of less than a majority of its employees, and commending it for having done so.)

It is not amiss, in view of the decision of the Wisconsin Supreme Court in the case of *Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wis-*

consin Employment Relations Board, et al., 295 N. W. 634, to point to one further example of irreconcilable conflict between the National and State Labor Relations Acts.

Congress has declared it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate those obstructions when they have occurred . . . by protecting the exercise by workers of full freedom of association, self-organization, . . . for the purpose of negotiating the terms and conditions of their employment **OR OTHER MUTUAL AID OR PROTECTION.**"

As a concrete expression of this declared policy, Congress, in Section 7 of the National Act, has provided that "employees shall have the right . . . to engage in **CONCERTED ACTIVITIES** for the purpose of collective bargaining or **OTHER MUTUAL AID OR PROTECTION.**"

Here, beyond any room for dispute or cavil, is granted to employees the fundamental substantive right "to engage in concerted activities" for their mutual aid or protection. This right is nowhere and by no means limited to concerted activities pursued after a strike has been voted by a majority of the employees in a collective bargaining unit in a secret ballot. On the contrary, Congress could not, even if it so desired, constitutionally limit that right to a majority group. *Thornhill v. State of Alabama*, 310 U. S. 88, 84 L. Ed. 1093.

However that may be, the right of minorities to strike, picket and boycott for their mutual aid is granted by Congress in the exercise of its plenary power to regulate interstate commerce. That being so, the State cannot, under guise of exercising its police power, or on any other pretext, thwart that Congressional design by removing from minority groups of employees the right to engage in those ac-

tivities. Accordingly, Section 111.06 (2) (e) of the Wisconsin Act, which deprives minority groups of the right to engage in "picketing, boycotting or any other overt concomitant of a strike; unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike," too, represents a profound and irreconcilable conflict with the National Act and cannot under elementary constitutional principles be applied to the employees of an employer that is subject to the National Act.

The *Hotel* decision of the Wisconsin Court also is in direct conflict with the provision of the National Act that:

"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike". (Sec. 13.)

Under the decision of the Wisconsin Supreme Court, the State Act has divided strikes into "authorized" and "unauthorized", and has validly prohibited the peaceful concerted activities required to make a strike effective. This results in those cases where the majority of employees have not licensed the strike by secret ballot. The right to strike which is preserved in the National Act is, therefore, denied under the State Act.

Many other examples of conflict come to mind. However, in view of the extended treatment given this subject in appellant's brief, further extension of this brief seems unnecessary.

Conclusion.

It is respectfully submitted that the Wisconsin Board had no jurisdiction over this case, and that the court below erred in enforcing the order of the said Board. The Wisconsin State Federation of Labor respectfully requests this Honorable Court to reverse and set aside the judgment of

the Circuit Court of Milwaukee County as affirmed by the Supreme Court of the State of Wisconsin, and to declare unconstitutional and void Chapter 111, Wis. Stats. 1937, with respect to any attempted application of such statute to employers and employees subject to the National Labor Relations Act.

Respectfully submitted,

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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1941

ALLEN-BRADLEY LOCAL No. 1111, UNITED ELE-
TRICAL, RADIO AND MACHINE WORKERS OF AMER-
ICA, ET AL., APPELLANTS

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND
ALLEN-BRADLEY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF
WISCONSIN

MEMORANDUM FOR THE UNITED STATES AMICUS
CURIAE

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WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES AMICUS CURIAE

This memorandum is submitted in response to a request from this Court to the Solicitor General that the Government submit a brief advising the Court of the Government's position on the question whether the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*) supersedes the Wisconsin Peace Employment Act, Wisc. Laws of 1939, c. 57, Wisc. Stat. (1939), c. 111.

PRELIMINARY STATEMENT

The critical facts presenting the issue of super-sedure may be briefly summarized as follows: Allen-Bradley Company (herein called the Company) is subject to the National Labor Relations Act, and the National Labor Relations Board (R. 2, 22, 36). The Wisconsin Employment Relations Board (herein sometimes called the State Board), upon complaint filed by the Company (R. 28-31), and after hearing, issued findings and an order (R. 13-17). The State Board found that Allen-Bradley Local No. 1111, United Electrical, Radio, and Machine Workers (herein called the Union), and 14 named employees had committed certain unfair labor practices within the meaning of the Wisconsin Peace Employment Act (herein sometimes called the State Act) (R. 13-16); it accordingly ordered the Union and its members to cease and desist from engaging in mass picketing at or near the Company's plant, from threatening employees of the Company with physical injury, property damage, or otherwise, from obstructing or interfering with entrance to and egress from the Company's factory, from obstructing or interfering with the free and uninterrupted use of the streets, public roads and sidewalks surrounding the Company's factory, and from picketing the domicile of any employee (R. 16-17). The State Board also ordered the Union

to post appropriate notices (R. 17). Although Section 111.02 (3) (b) of the State Act defines an employee, *inter alia*, as one "who has not been found to have committed or to have been a party to any unfair practice hereunder", and although the Company, in its prayer for relief, requested the State Board to declare that such persons as might be determined to have committed or to have been parties to any unfair labor practices were no longer employees of the Company as defined in Section 111.02 (3) (b) (R. 31), the State Board did not supplement its finding that the 14 individuals had committed unfair labor practices with a further finding or order that such individuals had thereby lost their status as employees. The Wisconsin Supreme Court, in enforcing the State Board's order, expressly held that the State Board had discretion in the matter, that the employee status does not automatically terminate on a finding of unfair labor practices, and that since the Board did not declare or order such termination, the 14 individuals retained their status as employees (R. 50-51, 52).¹

¹ The Wisconsin Supreme Court in an earlier case (*Hotel etc. Employees v. Wisconsin Employment Relations Board*, 236 Wis. 329, 345) apparently held that an individual found to have committed an unfair labor practice thereby lost his status as an employee. But if the Wisconsin Supreme Court did so hold, it clearly overruled that holding in the instant case.

The question presented is, therefore, whether the State Board's order, as construed by the Wisconsin Supreme Court, or the State Act pursuant to which the State Board issued its order, is invalid since applied to a company whose employer-employee relations are subject to the National Labor Relations Act.

ARGUMENT

I

The question of supersedure may arise in one of two postures, depending upon the decision of the Court as to the scope of the issues before it. Appellees contend that, for purposes of the present case, the State Act must be read as though it contained only provisions authorizing the State Board to enter orders of the specific type now before the Court;² appellants contend, on the other hand, that the State Act may not be read in such disjunctive fashion and that the question before the Court is whether the State Act is invalid in its entirety (Br. 49-51).

Different considerations with respect to supersedure may prevail, depending upon which view the Court takes of this controversy over the scope of the issues in this particular case. Consequently, full compliance with the Court's request to be advised of the Government's position on the question of supersedure requires us to con-

² See Brief of Wisconsin Employment Relations Board, pp. 16-26; Brief of Allen-Bradley Co., pp. 33-34.

sider the question in both possible postures in which it may be presented. Accordingly, we consider first whether there is any conflict between the National Labor Relations Act and the State Act, read for purposes of this case as though it authorized only the type of order here involved, and second, whether there is conflict between the National Labor Relations Act, on the one hand, and, on the other, the State Act considered as an inseparable whole.

II

If, as appellees contend, the State Act must be read for purposes of the present case as though it contained only provisions authorizing the State Board to enter orders of the specific type now before this Court—in other words, if the case is to be considered as though those provisions constituted a separate statute and as though the remainder of the Wisconsin Peace Employment Act were not in existence—we believe that no conflict with the National Labor Relations Act does exist.

Nothing in the terms or the legislative history of the National Labor Relations Act bars appropriate State regulation of employee misconduct of the type prohibited in the order here in controversy. This Court has said (*Savage v. Jones*, 225 U. S. 501, 533):

the intent to supersede the exercise by the State of its police power as to matters

not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field.

The only employee or union misconduct forbidden by the State Board in this case was mass picketing, threatening other employees with physical injury or property damage, obstructing entrance to and egress from the Company's factory, obstructing the streets surrounding the Company's property, and picketing the domicile of any employee. The State Board's order was directed against the appellant union and its members. No order was issued specifically directed toward the fourteen individuals found to have committed unfair labor practices, and they retained their status as employees of the Company.

We do not think that Congress intended to preclude a State from enacting legislation limited to prohibition of this type of employee misconduct.² On the contrary Congress expressly recognized that the authority of the several States could or would be exerted to prohibit such misconduct (S. Rep. No. 573, 74th Cong., 1st Sess., p. 16; H. Rep. No. 1147, 74th Cong., 1st

² We limit ourselves, of course, to the issue whether the State Board's order is invalid because superseded; whether the order may possibly be unconstitutional in its application in other respects is not an issue with which we deal here.

Sess., p. 16).⁴ Such employee practices are not prohibited by the National Labor Relations Act, and the order in question could not have issued under the Act.

We believe, therefore, that the mere enactment of the National Labor Relations Act did not, without more, exclude State regulation, whether by administrative agencies or otherwise, exclusively dealing with the type of employee misconduct here forbidden and not depriving employees of rights protected by the National Act. Accordingly, if the Wisconsin statute is to be read as though it contained only provisions authorizing the State Board to issue orders of the specific type at bar, it could not be said that such orders are prohibited by some paramount federal act or intention.

III

Appellants urge, however, that the particular provisions of the statute under which the order was issued are an inseparable part of a single regulatory pattern designed to regulate the conduct of employees as well as of employers, and that the particular provisions upon which the order rests may not be regarded as a theoretically

⁴ Compare the report of the National Labor Relations Board, Hearings before the Senate Committee on Education and Labor on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, and S. 2123 (76th Cong., 1st Sess., 1939), Pt. III, p. 521.


8

separate enactment. This view is of peculiar force because the statute deals very broadly with personal conduct in the field of labor relations and labor conflict, where the diverse activities of the participants and the parties affected by the statutory regulations necessarily react one upon the other. If the provisions referred to are considered by the Court as an intertwined part of a single regulatory pattern, as we believe they should be, the question would be posed whether the Wisconsin Act, considered as an inseparable whole, has been superseded by the federal enactment. This question, we think, must be answered in the affirmative.

A. Upon the face of the two statutes, serious differences and conflicts appear throughout their respective texts—set forth in parallel columns in Appellants' brief, pp. 55-81, and discussed at pp. 31-45 of that brief. Among these major differences are the following:

Labor policy.—It is the stated policy of the National Act to promote industrial peace by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

To promote this object, the Act is directed primarily against the forms of economic pressure



and authority frequently exercised by employers over their employees in an effort to maintain their superiority of bargaining position with respect to terms and conditions of labor. The stated statutory objective of the Act to encourage collective bargaining has been an important factor in its construction. See *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177.

This Court recognized long ago that the right to organize and bargain collectively was "fundamental," and that "union was essential to give laborers opportunity to deal on an equality with their employer," *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209. In cases under the Act, this Court has recognized that even "slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure," *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 78, and that "intimations of an employer's preference, though subtle, may be as potent as outright threats of discharge." *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 600.

The individual worker exercises no such authority or power over his fellow workman in the

economic sphere. It is therefore a departure from the Congressional policy to suggest, as the State Act does, in its references to "interference" and "coercion" by either party (see 111.01 (2), 111.06 (2)), that employers and employees stand upon an equal footing in this respect, that workers and unions have no more legitimate concern in the organization of employees than have the employers themselves. This departure from Congressional policy is reflected in the variations of the State Act from the text of the Federal Act.

Definition of "employee."—Section 111.02 (3), defining "employee," includes any individual whose work has ceased in connection with any current labor dispute or because of any unfair labor practice and "who has not been found to have committed or to have been a party to any unfair labor practice hereunder * * *." Workers otherwise eligible for reinstatement could thus be excluded from their jobs, denied employment status, and denied the right to vote in employee elections, if they engage in practices deemed "unfair labor practices" under the State Act.

On the other hand, it is a settled policy under the National Labor Relations Act, judicially approved, that employee misconduct of the type involved in the instant case does not deprive an employee of his status as employee or of his protection guaranteed by the Act. E. g., *Republic*

Steel Corp. v. National Labor Relations Board, 107 F. (2d) 472 (C. C. A. 3), affirmed with modification in other respects, 311 U. S. 7; *National Labor Relations Board v. Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3), certiorari denied, 308 U. S. 605. Under the National Act, the employment status, and the privileges that flow from it, are not forfeited because of minor misconduct such as frequently occurs in the highly charged atmosphere of a labor dispute, misconduct "as common to labor disputes as a fist-fight upon a picket line." *National Labor Relations Board v. Stackpole Carbon Co.*, *supra*. Yet, upon such grounds, an employee could be deprived of rights deemed by this Court to be "fundamental" (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S., at p. 33)—rights not created, but recognized and enforced, by the National Act. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261.

Definition of "labor dispute."—Section 111.02 (8) of the State Act defines a labor dispute as a controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or procedure or details of collective bargaining or the designation of representatives. This definition substantially differs from that in the federal law (Section 2 (9)) in three important respects. First, the State Act excludes from the definition all controversies re-

garding wages, hours, and working conditions—the major cause of labor strife. Second, it excludes from the definition controversies between disputants who do not stand in the proximate relation of employer and employee. Cf. *Senn v. Tile Layers Union*, 301 U. S. 468; *Lauf v. Shinner*, 303 U. S. 322. Third, it excludes any controversy with employees who may at the moment represent only a minority in the proper bargaining unit but who may have legitimate grievances normally justifying strike action.

Bargaining units.—Section 111.02 (6) restricts the appropriate bargaining unit to a single employer, and provides that a majority of the employees in any craft, division, department, or plant may split off from any such unit and compel recognition as a separate unit. The National Act, on the other hand, provides generally that the National Board shall determine the proper unit in each case in order to insure to employees the full benefit of their right to self-organization and to collective bargaining. Section 9 (b).

The probabilities of conflict and confusion in these inconsistent provisions are endless. This Court is well aware of the difficulties involved in determining appropriate bargaining units. Cf. *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146; *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 308 U. S. 413; *International*

Association of Machinists v. National Labor Relations Board, 311 U. S. 72. The Court may also take judicial notice of the existing breach in the labor movement, and the conflicts as to jurisdiction and collective bargaining units which have resulted from that breach. Cf. *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401.

Collective Bargaining. Section 111.02 (5) defines collective bargaining as "the negotiating" by an employer and a majority of his employees "in a mutually genuine effort to reach an agreement." The National Act has no definition of this term, but the requirement of collective bargaining in Section 8 (5) has been construed to extend beyond the act of negotiation, and to include a written agreement when terms and conditions are actually agreed upon after negotiation. *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514.

Section 111.06 (I) (d) provides that the employer is not guilty of refusing to bargain collectively in the event that he demands an election. The National Act imposes no such limitation. This provision is obviously subject to endless abuse by any employer anxious to avoid meeting his employees' representatives at the counsel table. Cf. *National Labor Relations Board v. Bradford Dyeing Assn.*, 310 U. S. 318; *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72.

Company-dominated unions. Section 111.06 (b) permits the employer to "cooperate" with representatives of a majority of his employees, at their request, by allowing "employee organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company." Under the National Act, in a proper case, this is a form of forbidden employer support of a labor organization. See *National Labor Relations Board v. Bradford Dyeing Assn.*, 310 U. S. 318.

Under the election procedure outlined in Section 111.05 (3), the State Board *must* list on the ballot the names of all "persons" (including organizations) submitted by an employee or group, except that it *may*, in its discretion, exclude from the ballot an organization which stands deprived of its status because previously adjudged to have engaged in an unfair labor practice. Under the National Act, the Board is most circumspect in placing on the ballot so-called "independent unions" which may, upon investigation, be shown to be company-dominated, or have the continuing benefit of the employer's prior unlawful assistance. Cf. *National Labor Relations Board v. Falk Corporation*, 308 U. S. 453, 461; *National Labor Relations Board v. Bradford Dyeing Assn.*, *supra*. Unsympathetic administration in this regard would make a mockery of the employees' rights.

Limitations on the right to strike.—Section 111.06 (2) (e) forbids employees to engage in specified strike activities unless a majority of the employees have voted for the strike and have served notice to this effect on the employer. The National Act, on the other hand, provides that nothing therein shall be construed to impede or interfere with or diminish in any way the right to strike (Section 13). We believe that the National Act reflects a federal policy with respect to the right to strike and that it is part of this federal policy that a minority will have the same right as the majority to engage in concerted strike activities.

Union disqualification.—Section 111.07 (4) authorizes orders by the State Board suspending for a period of a year the rights, immunities, privileges or remedies of the State Act to any "person," including a labor organization, found to have committed any unfair labor practice thereunder. Section 111.06 (3). Such practices, as defined in the State law, including minor misconduct, are not only punishable under the law, but result in disqualification and impairment of the all important substantive benefits granted by its terms. There is no such provision in the National Act. A comparable penalty on the employer would be the withdrawal of its corporate charter for a year if it countenances any breaches of the peace by its agents, guards, or hired detectives in

the course of a labor dispute. The peaceable settlement of labor disputes, and the orderly resumption of collective bargaining relations, is impaired, not assisted by such sweeping penalties.

On the foregoing analysis of the two statutes, the same employer and the same employees will have different status, rights and privileges arising from the same set of facts.

These conflicts in substantive law are not variations of a substantially similar pattern of employer-employee relationships; they represent vital differences in approach, in policy, and in practical effect. It is significant that ever since the National Act was placed upon the statute books, Congress has rejected repeated attempts to amend the National Act in many of these very respects. (E. g., S. 1264, 76th Cong., 1st Sess.; H. R. 4990, 76th Cong., 1st Sess.; H. R. 8813, 76th Cong., 3rd Sess.)

The conflicting statutes have led inevitably to a number of serious clashes in administration, affecting employment relations in plants subject to the National Act. These difficulties are described in concrete cases in a statement of the National Labor Relations Board to the Solicitor General, set forth in the Appendix for the convenience of the court (*infra*, pp. 26-34). These administrative difficulties have arisen in action by the State Board excluding from employee elections workers who would be eligible under the

National Labor Relations Act; establishing collective bargaining units differing from those established by the National Labor Relations Board; and qualifying for collective bargaining status so-called "independent unions" deemed company-dominated by the National Board. Indeed, in the very controversy at bar, it appears from the National Board's statement (*infra*, p. 28) that the State Board disqualified from voting in an employee election six workers who were discriminated against in violation of Section 8 (3) of the National Act and were reinstated under a settlement between the Company and the National Board. These six men are among the 14 who are found guilty of "unfair labor practices" by the State Board under the findings and order in this case.

In some instances, these conflicts of administration led to serious threats of strife threatening the free flow of interstate commerce. In all instances, the conflicts delayed and frustrated that stable and orderly settlement of employee-employer relations essential to industrial peace and fullest industrial efficiency. The National Board concludes that "the differing and conflicting provisions and objectives of the State Act have tended in practice to interfere with and frustrate the policies of the National Labor Relations Act." Significantly, the National Board reports that "there has been no such conflict or difficulty in various other States

which have enacted State Labor Relations Acts whose provisions and objectives are in harmony with those of the National Act, and whose State Boards have evidenced a cooperative attitude in administering the state Acts."

Administrative controversies such as those described by the Labor Board are embarrassing enough in time of peace. They take on added seriousness in a nation at war, when every material and human resource is strained to achieve maximum productive efficiency through employee-employer cooperation and voluntary arbitration of all disputes, predicated upon the national labor policy embodied in the National Labor Relations Act. (Executive Order No. 9017, establishing National War Labor Board, 7 Fed. Reg. 237.)

B. The constitutional principles applicable in such circumstances are clearly stated in the decisions of this Court. The National Labor Relations Act, a valid congressional enactment, is the supreme law of the land. "It is manifest that the enactment of this State law could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 223-224.

Some decisions of this Court go so far as to rule out all State authority over a subject matter

touched upon by congressional enactment, regardless of actual conflict. *Prigg v. Pennsylvania*, 16 Pet. 539, 617; *Houston v. Moore*, 5 Wheat. 1, 25; *Charleston & Carolina R. R. v. Varnville Co.*, 237 U. S. 597, 604; *Oregon-Washington R. R. & Nav. Co. v. Washington*, 270 U. S. 87. The reasoning is that State laws similar to Federal laws covering the same subject matter are "idle and inoperative," and those in conflict with Federal authority are invalid *a fortiori*.

We make no such contention here. Several State labor relations statutes are patterned closely after the National Act, have been administered in harmony with it, and serve an important function in the area of intrastate commerce. See Mass. Acts of 1938, c. 345, as amended; Acts of 1939, c. 318, as amended; Acts of 1941, c. 261; N. Y. Laws 1940, c. 4, 126, 569, 634, 689, 750, 773; Rhode Island Laws 1941, Sen. Bill No. 54A; Utah Laws 1937, c. 55. Cf. *Davega-City Radio v. N. Y. State Labor Relations Board*, 281 N. Y. 13. The original Wisconsin labor relations act, upheld in *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, was in this category. Constitutional objection arises in the case at bar, not by any implication of exclusiveness drawn merely from the language or the "silence" of Congress, but from the manifest conflicts between the National Labor Relations Act and the

Wisconsin Employment Peace Act of 1939. These conflicts arise in the terms and practical administration of the two statutes when the State Act is applied, as here, to the production phase of a business producing goods for interstate commerce and admittedly (R. 48). subject to the National Act.

In contrast to other contemporary legislation, the National Labor Relations Act contains no clause declaring that state laws bearing on the same subject matter shall not be abrogated. E. g., Securities Act of 1933, 48 Stat. 85, 15 U. S. C., Sec. 77r; Securities Exchange Act of 1934, 48 Stat. 903, 15 U. S. C. Sec. 78bb. Cf. Fair Labor Standards Act, Sec. 18, 52 Stat. 1060, 29 U. S. C. Sec. 218. Rather, the Labor Act provides in Section 10 (a) that the Board's power to prevent the designated unfair labor practices "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." The Senate Committee on Education and Labor, in charge of the legislation, said in its Report (S. Rep. No. 573, *supra*, p. 15).

Section 10 (a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters. Thus it is

intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining.

While this provision of Section 10 (a) was largely directed at the diffusion of federal administrative responsibility under pre-existing law (*id.*, pp. 4-5), this is a far cry from respondent's contention that Congress intended to permit state statutes to operate side by side with the National Act, affecting the same employees and interstate employers in inconsistent ways on the same set of facts. Certainly what Congress intended is clearly stated—"to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining." Since Congress so plainly frowned on conflict at the federal level, there is certainly no reason to suggest it welcomed conflict between the federal law and state authority.

Manifestly the broad principles of collective bargaining embodied in the National Act could not be effectuated in interstate industries by the isolated action of competing individual states. Cf. *Steward Machine Co. v. Davis*, 301 U. S. 548, 588; *United States v. Darby*, 312 U. S. 100, 122. Indeed, prior to its passage, there was no similar regulation in any State. Those same principles

would be certainly frustrated and impeded if any State were now held free to enact a conflicting statute with overlapping jurisdiction. Such a state statute could no more be tolerated in production plants using the channels of interstate commerce than in enterprises engaged in interstate transportation and subject to the Railway Labor Act.

C. We conclude that if it is to be considered as an inseparable whole, the State Act as applied to employees and employers within the jurisdiction of the National Labor Relations Act conflicts with, and must therefore be deemed superseded by, the paramount federal law. This conclusion does not render a State powerless to carry out its own policy within its proper sphere of constitutional authority, nor does it create a twilight zone of jurisdiction or regulation in which neither state nor federal authority may properly operate. A State is free to regulate employee or union misconduct by appropriate means, whether the plants in question are engaged in interstate or intrastate business. A State is also free to retain the substantive requirements of its statute intact as applied to intrastate plants not subject to the National Act, or in the alternative, to bring those substantive requirements into line with the National Act, as is done in the Massachusetts, New York, Utah and Rhode Island labor relations laws. All that the State cannot do is to impair the effectiveness or the policy of valid fed-

eral authority over interstate commerce, including those intrastate operations which directly affect that commerce. To that extent, the Constitution circumscribes the State's freedom of action.

It is true, as appellee State Board maintains (Br. p. 64), that the scope of the federal power must be viewed in the light of our dual system of government and may not be extended to obliterate the distinction between what is national and what is local. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37. That issue is one of degree, which is resolved in favor of the paramount federal law once it is conceded, as here, that the Company is subject to its terms. In this view, a state statute falls if it is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U. S. 52, 67. Since the terms of the National Act must prevail as to employers engaged in interstate commerce or whose unfair labor practices directly affect that commerce, the requirements of the State Act are precluded, "however commendable or however different their purpose". *Napier v. Atlantic Coast Line*, 272 U. S. 605, 613. The Wisconsin statute is therefore not saved from constitutional objection because it is stated to be an exercise of the State's "police power" (R. 48).

This repugnance is not eliminated by the concession in the opinion below (R. 48) that the Na-

tional Act would take precedence if the jurisdiction of the National Board were invoked and an order issued against an interstate employer. Once the State Act, in terms or practical effect, is deemed to conflict with the National Act, it falls, even where no federal administrative action has been taken (*Napier v. Atlantic Coast Line*, 272 U. S. 605, 613) or, indeed, where the State's order in question could not have issued under the "conflicting" federal law. *Cloverleaf Butter Co. v. Patterson*, No. 28, present Term, decided February 2, 1942.

These conclusions are reinforced by the nature of the National Act. It creates no new private rights and grants no private right of action. "Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal." H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24; see *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 266-268. These national objectives are not to be defeated, embarrassed and frustrated by conflicting state law or administration, regardless of whether the employees or union in question happen to invoke the federal law, or the state

agency happens to apply the state statute, in a particular way in a particular case.

The state statute, as it stands, is capable of being given legal effect in the entire area of intrastate operations beyond the jurisdiction of the National Act. *Hatch v. Reardon*, 204 U. S. 152; *Bowman v. Continental Oil Co.*, 256 U. S. 642; *The Abby Dodge*, 223 U. S. 166. Whether the statute should be given such effect is for the state courts to determine in an appropriate case.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1942.

APPENDIX

NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D. C., *February 7, 1942.*

H. A. Millis, *Chairman*; William M. Leiserson,
Gerard D. Reilly

Honorable CHARLES FAHY,
Solicitor General of the United States,
Washington, D. C.

DEAR MR. FAHY: In response to your request and at the direction of the National Labor Relations Board, I am advising you of the experience of the National Labor Relations Board in administering the National Labor Relations Act (49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) in the State of Wisconsin since the enactment in 1939 of the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, c. 57). The information herein stated is based upon a report submitted to the National Labor Relations Board by its Regional Director for the Twelfth Region which embraces the State of Wisconsin.

The concurrent exercise of jurisdiction by the National Labor Relations Board (hereafter called the National Board) and the Wisconsin Employment Relations Board (hereafter called the State Board) over unfair labor practice questions and over representation questions affecting interstate commerce has given rise to many problems difficult, and perhaps impossible, of solution. The difficulties have arisen largely because of the dif-

fering and to some extent conflicting provisions and statutory objectives of the two Acts. It is the considered conclusion of the National Board that the provisions and objectives of the Wisconsin Employment Peace Act (hereafter called the State Act) in so far as they depart from or conflict with those of the National Labor Relations Act (hereafter called the National Act) have in practice seriously interfered with and frustrated the declared policy of the United States set forth in the National Act—

to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection (Section 1).

We shall set forth some of the specific instances in which the administration of the State Act has in practice conflicted and interfered with the administration of the National Act.

1. *Allen-Bradley Co., N. L. R. B. Case No. XII-*

C-473; W. E. R. B. Case No. 6 CW-1

This is the same case as that which, we understand, is now pending before the Supreme Court of the United States. On June 5, 1939, during the course of a strike called by a local C. I. O. Union, the employer filed a complaint with the State Board alleging that the Union and its

members had engaged in unfair labor practices under the State Act. On July 1, 1939, the Union filed charges with the National Board alleging that the employer had engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the National Act. On July 13, 1939, the State Board issued a decision finding that the Union and 14 of its members had committed unfair labor practices under the State Act through mass picketing and minor violence and ordered that they cease and desist therefrom. As a result in part of the proceedings before the State Board, the strike was abandoned on August 4, 1939. On September 29, 1939, the Union amended its charges of unfair labor practices pending before the National Board. Thereafter, pursuant to action taken by the regional office of the National Board, these charges were settled prior to issuance of a complaint by the National Board; the settlement included the reinstatement with full seniority and other rights and privileges of six employees who, the Union had charged, were discriminated against in violation of Section 8 (3) of the National Act. These six employees were among the 14 employees who had been found to have committed unfair labor practices by the State Board. Thereafter, in 1940, the State Board upon petition of the employer conducted an election among the employees to determine collective bargaining representatives, but excluded from the voting the said 14 employees, including the six employees who had been reinstated with full seniority and other rights and privileges pursuant to action taken by the regional office of the National Board. The State

Board thus disenfranchised six persons who under the National Act were apparently employees like all other employees and entitled to all the rights and privileges pertaining to employee status.

2. *Northern States Power Co., N. L. R. B., Case No. (XII-RE-3) RE-31; W. E. R. B., Case No. 1, No. 397 E-138, Decision No. 283*

In the summer of 1941, pursuant to Section 9 of the National Act, United Mine Workers of America, District #50, affiliated with the C. I. O. filed a Petition for Investigation and Certification of Representatives with the National Board. Petitioner contended that the employees at the Eau Claire, Wisconsin, plant of the Company constituted a unit appropriate for the purposes of collective bargaining. The Company, a utility operating in Minnesota and Wisconsin, had for four years had a contract with the International Brotherhood of Electrical Workers, affiliated with the A. F. of L., which established the entire system of the Company as an appropriate collective bargaining unit. The National Board dismissed the U. M. W. petition without formal hearing because, under its consistent policy respecting large integrated utilities and in view of the past history of bargaining relationships in this case, the Eau Claire unit was clearly inappropriate. The U. M. W. thereupon filed a Petition for Certification with the State Board, and that Board directed an election among the Eau Claire employees. Under Sections 111.02 (6) and 111.05 of the State Act, the State Board was without

discretion in the matter and was compelled to allow the Eau Claire employees to set themselves off from the larger unit if they so desired. The I. B. E. W. threatened to strike if the Company recognized the U. M. W. even if the latter won the State Board election; indeed the I. B. E. W. threatened to strike if the State Board even proceeded to hold the election. The Company then filed an employer petition with the National Board; that Board held formal hearings and made findings upholding the unit already in existence and under contract, and accordingly dismissed the petition on the basis that no question affecting representation existed. During the pendency of the National Board's proceeding the I. B. E. W. secured a temporary injunction from the Circuit Court of Dane County enjoining the State Board from holding the election it had ordered. The hearing on this matter, to make the injunction permanent, has not as yet been held. In sum, the difficulties in this case arose because of the differing standards for unit determination set forth in the State Act and the National Act.

3. *Fox River Valley Knitting Co., N. L. R. B., Case No. XII-C-742; W. E. R. B. Case No. 1, No. 432 E-149*

The International Ladies Garment Workers Union filed charges with the National Board alleging violations by the Company of Section 8 (1) and (3) of the National Act, and later filed a Petition for Investigation and Certification of Representatives pursuant to Section 9 of that Act.

Shortly thereafter a so-called Independent Union came into existence. The charge was amended to include an allegation of violation by the Company of Section 8 (2) with respect to the Independent. The National Board's investigation of the charges disclosed sufficient facts to warrant a conclusion of prima facie violation of Section 8 (1), (2), and (3). While the investigation was proceeding, the Independent Union filed a Petition for Certification with the State Board. The National Board advised the State Board of the pendency of the proceedings before the National Board. Thereafter the National Board, in accordance with its practice of securing compliance with the National Act voluntarily if possible, prepared a stipulation which would resolve all questions in dispute and which provided for disestablishment of the Independent. After all parties had tentatively indicated their approval of the stipulation, the State Board issued an Order and Direction of Election in which the Independent would appear on the ballot. This action of the State Board very nearly upset the entire adjustment and threatened to burden interstate commerce with a strike. The International Ladies Garment Workers Union let it be known that if the State Board proceeded with the election, the Union would be likely to strike. The Independent, which had been contemplating dissolution, secured a new lease on life through the indirect legalization of its existence inherent in the State Board's Order placing it on the ballot. Happily, the matter was finally disposed of as contemplated in the original stipulation but the disposition was

made much more difficult by the intrusion of the State Board after the National Board had taken jurisdiction.

It may be added that there is a vital difference in the practice of the National Board and the State Board in investigating representation petitions filed by alleged independent unions. Because experience has revealed that many employers have in the past formed company-dominated unions in the guise of independent unions, the National Board carefully investigates the origins of independent unions before permitting them to appear on the ballot. The State Board apparently imposes no such preliminary requirement. The result is that, as in the instant case, the Independent could easily have been certified as bargaining representative under the State Act. Yet under the National Act, the Independent existed in violation of the law, its existence was a continued threat to the free flow of commerce, and that threat was only removed with the disestablishment of the Independent.

4. *Creamery Package Mfg. Co., N. L. R. B. Case No. (XII-R-341) R-2705; W. E. R. B. Case III, No. 348 E-117*

Prior to May 17, 1941, the Steel Workers Organizing Committee organized the office employees of the Company and requested exclusive recognition. The Company refused such recognition and on May 17, 1941, filed a Petition for Investigation and Certification under the State Act with the State Board. On May 22, 1941, the S. W. O. C. filed a Petition for Investigation and Certification of Representatives under the National Act with

the National Board. The S. W. O. C. also moved before the State Board to dismiss the Company's petition. On June 23, 1941, the State Board denied the motion* and issued an Order and Direction of Election. On July 3, 1941, the National Board held a hearing on the petition pending before the National Board. On July 11, 1941, the State Board conducted its election among "all of the office employees of the Company at its Lake Mills plant except supervisory employees," which was won by the S. W. O. C. On July 16, 1941, the State Board certified the S. W. O. C. as exclusive bargaining agent of all of the office employees except supervisory employees. On August 8, 1941, the National Board issued its Decision and Certification of Representatives in which it certified the S. W. O. C. as the exclusive bargaining representative of all of the office employees of the Company at its Lake Mills plant except supervisory employees and confidential employees.

*In its Memorandum, the State Board stated in part:
 "• • • Should the National Labor Board set up a collective bargaining unit different from that determined by the Wisconsin Board, without any question, the unit set up by the National Labor Relations Board would be binding and would control the action of the employer. In that case, however; should a majority of the employees in the unit set up by the National Labor Relations Board vote against the unit, the only result would be a dismissal of the petition, and if a different unit were set up by the Wisconsin Board in which unit a majority of the employees voted in favor of representation, the employer would be bound under the terms of the Wisconsin law to bargain collectively with the employees of such unit through the union selected. We, therefore, deny the motion of the union to dismiss the petition."

The unit determined by the State Board thus differed somewhat from the unit determined by the National Board. The Company at first considered a refusal to bargain with S. W. O. C. pending resolution by court proceedings of the conflict in the unit findings. It was only after the S. W. O. C. threatened to strike that the Company agreed to accept the certification of the National Board.

The foregoing are not all of the examples of conflict and difficulty that have arisen through the concurrent exercise of jurisdiction over the same employer by the Wisconsin State Board and by the National Board.

On the other hand, there has been no conflict or difficulty in various other States which have enacted State Labor Relations Acts whose provisions and objectives are in harmony with those of the National Act, and whose state boards have evidenced a cooperative attitude in administering the state Acts. For example, the New York State Board has sought to avoid any impairment of the National Act by not assuming jurisdiction in cases in which the National Board has taken jurisdiction.

In Wisconsin, however, as above noted, we are of the view that the differing and conflicting provisions and objectives of the State Act have tended in practice to interfere with and frustrate the policies of the National Labor Relations Act.

Very sincerely yours,

(Sgd.) ROBERT B. WATTS,
Robert B. Watts,
General Counsel.

P. 7.

SUPREME COURT OF THE UNITED STATES.

No. 252.—OCTOBER TERM, 1941.

Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America, et al., Appellants.

vs.

Wisconsin Employment Relations Board and Allen-Bradley Company.

Appeal from the Supreme Court of the State of Wisconsin.

[March 30, 1942.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The sole question presented by this case is whether an order of the Wisconsin Employment Relations Board entered under the Wisconsin Employment Peace Act (L. 1939, ch. 57; Wis. Stat. (1939) ch. 111, pp. 1610-18) is unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act. 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

Sec. 111.06(2) of the state Act provides in part:

"It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04,¹ or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The state Board is given authority on the filing of a complaint to conduct hearings, to make findings of fact, and to issue orders.²

¹ Sec. 111.04 provides: "Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

² Sec. 111.07(4) provides in part: "Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one

§ 111.07. Orders of the state Board are enforceable by the circuit courts. *Id.* Appellee, Allen-Bradley Co., is engaged in the manufacturing business in Wisconsin. Appellant union is a labor organization composed of the employees of that company. The union had a contract with the company governing terms and conditions of employment. The contract was cancelled by the union. Thereafter the union by secret ballot ordered a strike, which was called on May 11, 1939. The strike lasted about three months during which time the company continued to operate its plant. Differences arose between the employees who were on strike and the company and those employees who continued to work. The company thereupon filed a petition with the state Board charging the union and certain of its officers and members with unfair labor practices. The union answered and objected, *inter alia*, to the jurisdiction of the state Board on the ground that as respects the matters in controversy the company was subject exclusively to the provisions of the National Labor Relations Act and to the exclusive jurisdiction of the federal Board. The state Board made findings of fact and entered an order against the union and its officers and members. On a petition for review, the circuit court sustained and enforced the Board's order. The Supreme Court of Wisconsin affirmed that judgment. 237 Wis. 164; 295 N. W. 791. The case is here on appeal. Judicial Code, § 237 (a); 28 U. S. C. § 344(a).

The findings and order of the state Board as summarized by the Supreme Court (237 Wis. pp. 168-170) are as follows:

"Briefly, from the findings the following facts appear:

"(a) Appellants engaged in mass picketing at all entrances to the premises of the company for the purpose of hindering and preventing the pursuit of lawful work and employment by employees who desired to work.

"(b) They obstructed and interfered with the entrance to and egress from the factory and obstructed and interfered with the free and uninterrupted use of the streets and sidewalks surrounding the factory.

"(c) They threatened bodily injury and property damage to many of the employees who desired to continue their employment.

"(d) They required of persons desiring to enter the factory, to first obtain passes from the union. Persons holding such passes were admitted without interference.

year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order."

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"(e) They picketed the homes of employees who continued in the employment of the company.

"(f) That the union by its officers and many of its members injured the persons and property of employees who desired to continue their employment.

"(g) That the fourteen individual appellants who were striking employees, had engaged in various acts of misconduct. The facts relating to those were found specifically. The acts consisted of intimidating and preventing employees from pursuing their work by threats, coercion, and assault; by damaging property of employees who continued to work; and as to one of them by carrying concrete rocks which he intended to use to intimidate employees who desired to work.

Based upon these findings the board found as conclusions of law, that the union was guilty of unfair labor practices in the following respects:

"(a) Mass picketing for the purpose of hindering and preventing the pursuit of lawful work.

"(b) Threatening employees desiring to work with bodily injury and injury to their property.

"(c) Obstructing and interfering with entrance to and egress from the factory.

"(d) Obstructing and interfering with the free and uninterrupted use of the streets and public roads surrounding the factory.

"(e) Picketing the homes of employees.

"As to the fourteen individual appellants, the board concluded that each of them was guilty of unfair labor practices by reason of threats, assaults, and other misdemeanors committed by them as set out in the findings of fact.

"Based upon its findings of fact and conclusions of law the board ordered that the union, its officers, agents, and members—

"(1) Cease and desist from:

(a) Mass picketing.

(b) Threatening employees.

(c) Obstructing or interfering with the factory entrances.

(d) Obstructing or interfering with the free use of public streets, roads, and sidewalks.

(e) Picketing the domiciles of employees.

"The order required the union to post notices at its headquarters that it had ceased and desisted in the manner aforesaid, and to notify the board in writing of steps taken to comply with the order.

"As to the fourteen individual appellants, the order made no determination based upon the finding that they were individually guilty of unfair labor practices."

It was admitted that the company was subject to the National Labor Relations Act. The federal Board, however, had not under-

taken in this case to exercise the jurisdiction which that Act conferred on it. Accordingly, the Supreme Court of Wisconsin upheld the order of the state Board stating that "there can be no conflict between the acts until they are applied to the same labor dispute." It was urged before that court, as it has been here, that there was nevertheless a conflict between that part of the findings of the state Board which deals with the individual appellants and the National Labor Relations Act. The contention is that the individual appellants who were found guilty of unfair labor practices, as defined in the state Act, are under the terms of the federal Act still employees of the company,³ while under the state Act that relationship is severed.⁴ As to that alleged conflict the Wisconsin Supreme Court made two answers: First, the federal Act had not been applied to this labor dispute. Second, it is the order, not the findings, of the state Board which affects the employer and employee relationship. Since there was no provision in the order which suspended the status as employees of the fourteen individual appellants who were found guilty of unfair labor practices, there was no conflict as to their employee status under the state and federal Acts.

Various views have been advanced here. On the one hand, it is urged that in this situation, as in the case of federal control over intrastate transportation rates (*Shreveport Case*, 234 U. S. 342, 357; *Board v. Great Northern Ry. Co.*, 281 U. S. 412, 424, 426-428), state action should not be foreclosed in absence of a finding by the federal Board under § 10(a) that an employer's labor practice so affects interstate commerce (*National Labor Relations Board v. Fainblatt*, 306 U. S. 601) that it should be prevented. On the other hand, it is earnestly contended that the state Act viewed as a whole so undermines rights protected and granted by the federal Act and is so hostile to the policy of the federal Act that it should not be allowed to survive. Acceptance of the latter theory would necessitate a reversal of the judgment below. Acceptance of the

³ See *Republic Steel Corp. v. National Labor Relations Board*, 107 F. 2d 472, 479 (aff'd 311 U. S. 7); *National Labor Relations Board v. Stackpole Carbon Co.*, 105 F. 2d 167, 176; *Hart & Prichard, The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 Harv. L. Rev. 1275.

⁴ Sec. 111.02(3) defines the term "employee" as including "any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and . . . (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, . . ."

former would mean that in all cases orders of the state Board would be upheld if the federal Board had not assumed jurisdiction.

We deal, however, not with the theoretical disputes but with concrete and specific issues raised by actual cases. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 132; *United States v. Appalachian Power Co.*, 311 U. S. 377, 423, and cases cited. "Constitutional questions are not to be dealt with abstractly." *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 22; *Arizona v. California*, 283 U. S. 423, 464. They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18, 22. Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress. *Mountain Timber Co. v. Washington*, 243 U. S. 219, 246; *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 429-430; *Watson v. Buck*, 313 U. S. 387. Hence we confine our discussion to the precise facts of this case and intimate no opinion as to the validity of other types of orders in cases where the federal Board has not assumed jurisdiction.

We are not under the necessity of treating the state Act as an inseparable whole. Cf. *Watson v. Buck*, *supra*. Rather, we must read the state Act for purposes of the present case as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause.⁵ The Wisconsin Supreme Court seems to have been liberal in interpreting such clauses so as to separate valid from void provisions of statutes.⁶ Aside from that, Wisconsin in this case has in fact applied only a few of the many provisions of its Act to appellants. And we have the word of the Wisconsin Supreme Court that "the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order." 237 Wis. p. 183. That construction is conclusive here. *Seng v. Tile Layers Union*, 301

⁵ Sec. 111.18 provides: "If any provision of this chapter or the application of such provision to any person or circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

⁶ See *State v. Tuttle*, 53 Wis. 45; *State v. Ballard*, 158 Wis. 251; *State v. Board of State Canvassers*, 159 Wis. 216; *State v. Lange Canning Co.*, 164 Wis. 228; *State v. Marriott*, 237 Wis. 607.

U. S. 468, 477; *Minnesota v. Probate Court*, 309 U. S. 270, 273, and cases cited. Hence we need not speculate as to whether the portions of the statute on which the order rests are so intertwined with the others that the various provisions of the state Act must be considered as inseparable. Since Wisconsin has enforced an order based only on one part of the Act, we must consider that portion exactly as Wisconsin has treated it—"complete in itself and capable of standing alone". *Watson v. Buck*, *supra*, p. 397. Viewed in that light, no conflict with the National Labor Relations Act exists.

The only employee or union conduct and activity forbidden by the state Board in this case was mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees. So far as the fourteen individuals are concerned, their status as employees of the company was not affected.

We agree with the statement of the United States as *amicus curiae* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports⁷ on the federal Act plainly indicate that it is not "a mere police court measure" and that authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an "intention of Congress to exclude States from exerting their police power must be clearly manifested". *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611, and cases cited; *Kelly v. Washington*, 302 U. S. 1, 10; *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U. S. 177; *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85; *Maurer v. Hamilton*, 309 U. S. 598, 614; *Watson v. Buck*, *supra*. Congress has not made

⁷ S. Rep. No. 573, 74th Cong., 1st Sess., p. 16: "Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. The Norris-LaGuardia Act does not deny to employers relief in the Federal courts against fraud, violence or threats of violence. See 29 U. S. C. § 104(e) and (i)." And see H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 16-17; Report of the National Labor Relations Board, Hearings before the Senate Committee on Education and Labor, 76th Cong., 1st Sess., on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, and S. 2123, Part 3, p. 521.

such employee and union conduct as is involved in this case subject to regulation by the federal Board. Nor are we faced here with the precise problem with which we were confronted in *Hines v. Davidowitz*, 312 U. S. 52. In the *Hines* case a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field any "concurrent state power that may exist is restricted to the narrowest of limits". p. 68. Therefore we were more ready to conclude that a federal act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. *Maurer v. Hamilton*, *supra*, and cases cited. Here we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.

Furthermore, in the *Hines* case the federal system of alien registration was a "single integrated and all-embracing" one. p. 74. Here, as we have seen, Congress designedly left open an area for state control. Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive (Cf. *Cloverleaf Butter Co. v. Patterson*, 314 U. S. —) as to prevent Wisconsin under the familiar rule of *Pennsylvania R. Co. v. Public Service Commission*, 250 U. S. 566, 569, from supplementing federal regulation in the manner of this order. Sec. 7 of the federal Act guarantees labor its "fundamental right" (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33) to self-organization and collective bargaining. Sec. 8 affords employees protection against unfair labor practices of employers including employer interference with the rights secured by § 7. Sec. 9 affords machinery for providing appropriate collective bargaining units. And § 10 grants the federal Board "exclusive" power of enforcement. It is not sufficient, however, to show that the state Act *might* be so construed and applied as to dilute, impair, or defeat those rights. *Watson v. Buck*, *supra*. Nor is the unconstitutionality of the provisions of the state Act which underly the present order established by a showing that other parts of the statute are incompatible with and hostile to the policy expressed

in the federal Act. Since Wisconsin has applied to appellants only parts of the state Act, the conflict with the policy or mandate of the federal Act must be found in those parts. But, as we have said, the federal Act does not govern employee or union activity of the type here enjoined. And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy. If the order of the state Board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a State takes steps to prevent breaches of the peace in connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court. See *Sinnot v. Davenport*, 22 How. 227, 243.

In sum, we cannot say that the mere enactment of the National Labor Relations Act without more excluded state regulation of the type which Wisconsin has exercised in this case. It has not been shown that any employee was deprived of rights protected or granted by the federal Act or that the status of any of them under the federal Act was impaired. Indeed if the portions of the state Act here invoked are invalid because they conflict with the federal Act, then so long as the federal Act is on the books it is difficult to see how any State could under any circumstances regulate picketing or disorder growing out of labor disputes of companies whose business affects interstate commerce.

We rest our decision on the narrow grounds indicated: We have here no question as to constitutional limitations on state control of picketing under the rule of *Thornhill's* case. 310 U. S. 88. Nor are any other constitutional questions concerning the Wisconsin Act properly presented. And in view of our disposition of the case we find it unnecessary to pass on other questions raised by the appellees.

Affirmed.